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No. _____

In The
Supreme Court of the United States

UNITED STATES STEEL CORPORATION AND
U.S. MAGNESIUM LLC,

Petitioners,

v.

CANADIAN LUMBER TRADE ALLIANCE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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Petitioners,

v.

CANADIAN LUMBER TRADE ALLIANCE, *et al.*

Respondents.

I, Jeffrey D. Gerrish, do hereby certify that, on this 27th day of May, 2008, I caused three copies of the Petition for a Writ of Certiorari on behalf of United States Steel Corporation and U.S. Magnesium LLC in the foregoing case to be served by hand delivery on the following parties:

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No. ___

UNITED STATES STEEL CORPORATION AND U.S. MAGNESIUM LLC,

Petitioners,

v.

CANADIAN LUMBER TRADE ALLIANCE, *et al.*

Respondents.

As required by Supreme Court Rule 33.1(h), I certify that the document contains 8015 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

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QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Federal Circuit erred in finding that parties are not statutorily barred from asserting a private right of action to enforce Section 408 of the North American Free Trade Agreement Implementation Act ("NAFTA Implementation Act").

Whether the "magic password" provision in Section 408 of the NAFTA Implementation Act is an impermissible legislative entrenchment provision that restricts Congress' power of the purse.

PARTIES TO THE PROCEEDING

The parties to the proceeding below are as follows: (1) the Petitioners, United States Steel Corporation and U.S. Magnesium LLC, and (2) the Respondents, Canadian Lumber Trade Alliance, Norsk Hydro Canada, Inc., Canadian Wheat Board, the Government of Canada, Ontario Forest Industries Association, Ontario Lumber Manufacturers Association, The Free Trade Lumber Council, the United States, Coalition for Fair Lumber Imports Executive Committee, U.S. Foundry & Manufacturing Co., Neenah Foundry Co., Municipal Castings, Inc., Lebaron Foundry, Inc., East Jordan Iron Works, Inc., Allegheny Ludlum Corporation, and AK Steel Corporation. In addition, the Government of Mexico, Mexinox USA, Inc., and ThyssenKrupp Mexinox S.A. de C.V. participated in the proceedings below as *amici curiae*.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Petitioner United States Steel Corporation does not have a parent company. In addition, no publicly held company owns 10% or more of United States Steel Corporation's stock.

Petitioner U.S. Magnesium LLC is a subsidiary of The Renco Group, Inc. No publicly held company owns 10% or more of U.S. Magnesium LLC's stock.

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v.

CANADIAN LUMBER TRADE ALLIANCE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF PETITIONERS UNITED STATES STEEL CORPORATION AND U.S. MAGNESIUM LLC IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit ("Federal Circuit") in *Canadian Lumber Trade Alliance v. United States* ("*CLTA III*"), 517 F.3d 1319 (Fed. Cir. 2008), is set forth in the Appendix. (App. A at 1a).

The judgments of the United States Court of International Trade ("CIT") in *Canadian Lumber Trade Alliance v. United States* ("*CLTA I*"), 425 F. Supp. 2d 1321 (Ct. Int'l Trade 2006), and *Canadian Lumber Trade Alliance v. United States* ("*CLTA II*"), 441 F. Supp. 2d 1259 (Ct. Int'l Trade 2006), are also set forth in the Appendix (App. B at 50a and App. C at 155a, respectively).

JURISDICTION

The judgment of the Federal Circuit was entered on February 25, 2008. An order granting the United States' motion to extend the time to file a petition for rehearing or rehearing *en banc* was entered on April 7, 2008. On May 7, 2008, the Federal Circuit entered another order that further extended the time to file a petition for rehearing or rehearing *en banc* to May 23, 2008. No petition for rehearing or rehearing *en banc* was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2000).

STATUTORY PROVISIONS INVOLVED

This Petition presents issues for review under two separate provisions of the implementing legislation for the North American Free Trade Agreement (the "NAFTA"). First, it presents issues pursuant to 19 U.S.C. § 3312(c) (2000), which is also known as Section 102(c) of the NAFTA Implementation Act (App. D at 194a). Section 102(c) serves as a statutory bar against private rights of action to enforce provisions of the NAFTA

Implementation Act. This Section states in pertinent part that

> No person other than the United States —
>
> > (1) shall have any cause of action or defense under —
> >
> > > (A) the Agreement or by virtue of Congressional approval thereof,
> > >
> > > ....

The full text of Section 102(c) of the NAFTA Implementation Act is set forth in the Appendix. (App. D at 194a).

Second, this Petition presents issues arising under 19 U.S.C. § 3438 (2000), which is also referred to as Section 408 of the NAFTA Implementation Act (App. D at 195a). This provision states that

> Any amendment enacted after the Agreement enters into force with respect to the United States that is made to —
>
> > (1) section 303 or title VII of the Tariff Act of 1930, {19 U.S.C. § 1671 *et seq.*} or any successor statute ...
>
> shall apply to goods from a NAFTA country only to the extent specified in the amendment.

Section 408 is a "magic password" provision in that it requires a subsequent Congress to make an express reference – *i.e.*, by specifying application to Canadian and Mexican goods – if it wants an amendment to Title VII of the Tariff Act of 1930 ("Title VII of the Tariff Act") to apply to such goods.[1] Title VII of the Tariff Act governs, *inter alia*, antidumping and countervailing duties that are imposed to combat unfair trade.

STATEMENT OF THE CASE

This Petition asks the Court to resolve a direct conflict among the Courts of Appeals as to whether parties have a private right of action under the Administrative Procedure Act ("APA") to enforce provisions in the implementing legislation of trade agreements enacted under the Congressional procedure commonly known as "fast track." As demonstrated below, such actions are barred by the prohibition against causes of action that arise under "the Agreement or by virtue of Congressional approval thereof" which is found in Section 102(c) of the NAFTA Implementation Act as well as in every single trade bill enacted under the fast track procedure. Although the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") has determined that such causes of action are barred, the Federal Circuit failed to do so here.

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[1] As indicated in Section 408, Title VII of the Tariff Act is found at 19 U.S.C. § 1671 *et seq.*(2000).

Absent action by this Court, parties in one Circuit will be able to bring claims to enforce the implementing legislation for trade agreements while parties in another Circuit will not. This Court should grant this Petition for Writ of Certiorari to ensure consistency among the Circuits. The Court should also grant this Petition for Writ of Certiorari because the Federal Circuit's interpretation of the relevant phrase "by virtue of Congressional approval thereof" in Section 102(c) of the NAFTA Implementation Act renders it superfluous and is otherwise erroneous.

This Petition further requests that the Court resolve the question of whether magic password provisions such as Section 408 of the NAFTA Implementation Act constitute an impermissible legislative entrenchment. Legislative entrenchment occurs when one Congress restricts the power of a subsequent Congress. While the Court has clearly established that legislative entrenchment is impermissible, the Court has never addressed the issue of whether magic password provisions represent legislative entrenchment. This case squarely presents this issue to the Court and does so in a critically important context involving Congress' power of the purse. Accordingly, the Court should grant this Petition for Writ of Certiorari to resolve this crucial and unresolved question.

Background. The NAFTA entered into force among the United States, Canada, and Mexico on January 1, 1994. *See* Statement of Administrative

Action ("SAA") Accompanying NAFTA Implementation Act, *reprinted in* H.R. Doc. No. 103-159 (I), at 454 (1993) (App. D at 214a). In the NAFTA, each Party expressly reserved "the right to apply its antidumping law and countervailing duty law to goods imported from the territory of any other Party." NAFTA, art. 1902(1) (Dec. 17, 1992) (App. D at 208a). Each of the Parties also reserved "the right to change or modify its antidumping law or countervailing duty law." *Id.*, art. 1902(2). Nevertheless, NAFTA Article 1902(2)(a) provides that among the NAFTA Parties such amendments "shall apply to goods from another Party only if the amending statute specifies that it applies to goods from that Party or from the Parties to this Agreement." *Id.*, art. 1902(2)(a).

Congress approved and implemented the NAFTA via the NAFTA Implementation Act under the procedure commonly known as fast track. NAFTA Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993), *codified at* 19 U.S.C. §§ 3301-3473 (2000). Fast track refers to procedures by which the Congress conducts an "up-or-down" vote on trade agreements and the accompanying implementing legislation without amendment. *See* 19 U.S.C. § 2191 *et seq.* (2000) (App. D at 184a-192a). Under fast track, trade agreements are approved and implemented through a single vote in a single bill. *See* Trade and International Economic Policy Reform Act of 1987, H.R. Rep. No. 100-40 (I), at 48-49 (1987) (App. D at 216a-218a). In other words, fast track "effectively merges legislative

approval with implementing legislation." *See* John Setear, *The President's Rational Choice of a Treaty's Preratification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement?* ("Setear"), 31 J. Legal Stud. S5, S29 (2002) (App. D at 202a-203a).

Congress implemented the requirements of Article 1902(2)(a) of the NAFTA in Section 408 of the NAFTA Implementation Act. 19 U.S.C. § 3438 (2000) (App. D at 195a). Moreover, Congress barred private rights of action brought under "the Agreement or by virtue of Congressional approval thereof" in Section 102(c) of the NAFTA Implementation Act.

In 2000, Congress amended Title VII of the Tariff Act by passing the Continued Dumping and Subsidy Offset Act of 2000 (the "CDSOA"). Pub. L. No. 106-387, § 1003, 114 Stat. 1549 (2000), *codified at* 19 U.S.C. § 1675c (2000) (App. D at 178a-183a). Prior to the CDSOA, the U.S. Bureau of Customs and Border Protection ("Customs") placed the money from antidumping and countervailing duties (collectively "duties") assessed on imported goods into the general fund of the United States Treasury. *CLTA III*, 517 F.3d at 1326 (App. A at 7a). The CDSOA directed Customs to distribute such money to U.S. companies that were affected by the conduct that gave rise to the antidumping and countervailing duties. *Id.* (App. A at 7a-8a); 19 U.S.C. §§ 1675c(a), (b)(1) (2000) (App. D at 178a-179a). Pursuant to the CDSOA, Customs distributed duties assessed on

Canadian and Mexican goods to the relevant U.S. companies.[2]

The CIT proceedings. On April 29, 2005, the Government of Canada and several Canadian companies and trade associations commenced actions under the APA before the CIT.[3] In those actions, the plaintiffs challenged Customs' distribution of duties assessed on Canadian imports pursuant to the CDSOA. Specifically, the plaintiffs contended that Section 408 of the NAFTA Implementation Act required any post-NAFTA amendment of Title VII of the Tariff Act to expressly state that it applied to goods from Canada and Mexico in order for goods from those countries to be subject to the amendment. They further argued that because the CDSOA was an amendment to Title VII of the Tariff Act and because the CDSOA did not

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[2] The CDSOA was repealed in the Deficit Reduction Act of 2005, but only with respect to duties collected on merchandise entering the United States after October 1, 2007. Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601(b), 120 Stat. 4, 154 (2006) (App. D at 201a). Customs currently holds a significant amount of duties for merchandise that entered the United States *before* October 1, 2007 that will be directly impacted by the resolution of the instant case. In fact, two cases concerning CDSOA distributions are stayed before the CIT pending resolution of this case. *Ivaco Rolling Mills 2004, L.P. et al v. United States*, Court No. 06-297 (Ct. Int'l Trade Nov. 21, 2006) (order granting motion to stay); *ThyssenKrupp Mexinox S.A. de C.V. et al v. United States*, Court No. 06-236 (Ct. Int'l Trade Sept. 25, 2006) (order granting motion to stay).

[3] The CIT asserted jurisdiction pursuant to 28 U.S.C. 1581(i) (2000) (App. D at 198a).

contain an express reference to Canada or Mexico, the CDSOA could not be applied to duties assessed on goods from those countries. The plaintiffs sought a declaratory judgment from the CIT to that effect, a permanent injunction against further CDSOA distributions of duties assessed on Canadian products, and the disgorgement of prior distributions made under the CDSOA.

Petitioners and several other U.S. parties that were eligible to receive money under the CDSOA intervened in the actions as defendant-intervenors. Thereafter, defendant United States and defendant-intervenors moved to dismiss the plaintiffs' actions pursuant to CIT Rules 12(b)(1) and 12(b)(5) for lack of jurisdiction and failure to state a claim for which relief can be granted. The plaintiffs cross-moved for summary judgment. The CIT converted all the pending motions into cross motions for summary judgment and/or motions for judgment on the agency record.

The CIT issued its decision on the parties' motions on April 7, 2006. In its decision, the CIT held that the Government of Canada lacked injury-in-fact, and thus standing. The CIT determined that the Government of Canada lacked standing because it had already elected a remedy by prevailing on its claims with respect to the CDSOA at the World Trade Organization ("WTO"). *CLTA I*, 425 F. Supp. 2d at 1350-52 (App. B at 102a-107a); Report of the Appellate Body, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R

(Jan. 16, 2003). However, the CIT found that the private party plaintiffs – *i.e.*, plaintiffs other than the Government of Canada – had standing to challenge the application of the CDSOA to duties assessed on Canadian goods. *CLTA I*, 425 F. Supp. 2d at 1349 (App. B at 101a-102a); *id.* at 1354 (App. B at 111a-112a).[4]

Furthermore, the CIT held that the private party plaintiffs had a private right of action to enforce Section 408 of the NAFTA Implementation Act. *Id.* at 1357-66 (App. B at 119a-137a). Defendant and defendant-intervenors had argued that Section 102(c) of the NAFTA Implementation Act barred claims to enforce the implementing legislation because such actions arise "by virtue of Congressional approval" of the NAFTA. However, the CIT disagreed. *Id.* at 1359-62 (App. B at 122a-131a). The CIT determined that Congressional "approval" is separate and distinct from "implementation" and, therefore, Section 102(c)'s bar against claims arising "by virtue of Congressional approval" of the NAFTA did not bar claims brought under the implementing legislation for the NAFTA. *Id.* at 1362-64 (App. B at 128a-131a). Thus, the CIT refused to apply Section 102(c) of the NAFTA Implementation Act to bar claims to enforce Section 408 of the NAFTA Implementation Act.

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[4] The CIT also found that the private party plaintiffs' claims were not barred by the political question doctrine. *CLTA I*, 425 F. Supp. 2d at 1354-57 (App. B at 112a-119a). This issue is not germane to the instant Petition.

Having determined that the private party plaintiffs had standing and that their claims were not barred, the CIT then addressed the merits. The CIT determined that "based on Congress' plain language in Section 408 of the NAFTA Implementation Act, Customs is not authorized to apply {the CDSOA} to goods from Canada or Mexico." *Id.* at 1373 (App. B at 152a). In so doing, the CIT rejected an argument that Section 408 of the NAFTA Implementation Act represented an impermissible legislative entrenchment provision. *Id.* at 1371 (App. B at 147a-148a).

Because it found in favor of the private party plaintiffs on the merits, the CIT ordered further briefing as to the appropriate remedy. *Id.* at 1373 (App. B at 153a). Following briefing and oral argument, the CIT issued its decision on the remedy on July 14, 2006. In that decision, the CIT granted prospective relief in the form of a declaratory judgment and a permanent injunction. *CLTA II*, 441 F. Supp. 2d at 1259 (App. C at 156a). Specifically, the declaratory judgment stated that pursuant to Section 408, the CDSOA "does not apply to antidumping and countervailing duties assessed on imports of goods from Canada or Mexico . . . ." Judgment, *Canadian Lumber Trade Alliance v. United States*, Consol. Ct. No. 05-00324 (Ct. Int'l Trade July 14, 2006) at 1-2 (App. C at 175a). In addition, the permanent injunction barred future CDSOA disbursements of duties assessed on certain products from Canada – namely those on softwood

lumber, magnesium, and hard red spring wheat. *Id.* at 2 (App. C at 175a-176a). Lastly, the CIT denied the private party plaintiffs' request for disgorgement of monies that Customs had previously disbursed under the CDSOA in fiscal years 2004 and 2005. *CLTA II*, 441 F. Supp. 2d at 1259 (App. C at 158a); *id.* at 1268-69 (App. C at 171a).

The Federal Circuit proceedings. Petitioners appealed the CIT's rulings regarding the private party plaintiffs' standing, the statutory bar in Section 102(c) of the NAFTA Implementation Act, and the interpretation of Section 408 of the NAFTA Implementation Act to the Federal Circuit.[5] As to standing, the Federal Circuit found that one private party plaintiff, the Canadian Wheat Board ("CWB"), still possessed standing to pursue its cause of action under the competitor standing doctrine.[6] *CLTA III*, 517 F.3d at 1331-35 (App. A at 18a-27a).

In addition, while its reasoning differed from that of the CIT, the Federal Circuit found that the CWB had a private right of action to enforce Section

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[5] The Government of Canada appealed the CIT's holding that it lacked standing. The Federal Circuit upheld the CIT's decision that the Government of Canada lacked standing, albeit on different grounds. *CLTA III*, 517 F.3d at 1335-38 (App. A at 28a-34a).

[6] The Federal Circuit dismissed the claims of Canadian producers in the softwood lumber and magnesium industries as moot based on events subsequent to the CIT's decision. *CLTA III*, 517 F.3d at 1338-39 (App. A at 34a-37a).

408. *Id.* at 1339-42 (App. A at 38a-43a). Based on its reading of the text of Section 102(c) of the NAFTA Implementation Act and the legislative history, the Federal Circuit held that Section 102(c) did not bar causes of action to enforce Section 408. According to the Federal Circuit, the term "by virtue of Congressional approval thereof" in Section 102(c) only barred causes of action brought to enforce one specific provision of the implementing legislation – Section 101(a) of the NAFTA Implementation Act. *Id.* The Federal Circuit reasoned that because this specific provision, and only this provision, represented Congressional approval of the NAFTA, the phrase "by virtue of Congressional approval thereof" solely related to causes of action brought to enforce this one provision. Because the CWB did not seek to enforce this one provision of the NAFTA Implementation Act, the Federal Circuit found that its cause of action was not barred.

Finally, the Federal Circuit affirmed without change the CIT's ruling regarding the merits of the CWB's claim under Section 408 of the NAFTA Implementation Act. *Id.* at 1342-44 (App. A at 43a-48a). In so doing, the Federal Circuit did not address defendant-intervenors' argument that Section 408 of the NAFTA Implementation Act was an impermissible legislative entrenchment provision.

REASONS FOR GRANTING THIS PETITION

I. This Court Should Grant this Petition Based on the Federal Circuit's Interpretation of Section 102(c) of the NAFTA Implementation Act

For the reasons set forth below, the Federal Circuit's decision that Section 102(c) of the NAFTA Implementation Act does not bar causes of action to enforce Section 408 of the NAFTA Implementation Act directly conflicts with a decision by the Ninth Circuit in a way that impacts every single trade bill adopted by Congress pursuant to the fast track mechanism. The Court should grant this Petition for Writ of Certiorari to resolve this Circuit split, to provide guidance to the Circuits on this issue, and to correct the Federal Circuit's fundamentally flawed decision.

A. There is a Direct Conflict Among the Circuits Regarding the Interpretation of Section 102(c)

Issues regarding statutory bars against private rights of action do not just arise with respect to the NAFTA and its implementing legislation. Like the NAFTA Implementation Act, the Uruguay Round Agreements Act ("URAA") is the implementing legislation for certain international agreements – *i.e.*, the Uruguay Round Agreements – acceded to by the United States. And like the

NAFTA Implementation Act, the URAA has a statutory bar provision found at Section 102(c). In fact, Section 102(c) of the NAFTA Implementation Act and Section 102(c) of the URAA have virtually identical language. Specifically, Section 102(c) of the URAA bars causes of action "under any of the Uruguay Round Agreements *or by virtue of congressional approval of such an agreement* . . . ." 19 U.S.C. § 3512(c)(1)(A) (2000) (App. D at 197a) (emphasis added). Likewise, as discussed above, Section 102(c) of the NAFTA Implementation Act bars causes of action under the "Agreement *or by virtue of Congressional approval thereof.*"

Despite the virtually identical language in the two provisions, the Ninth Circuit's interpretation of Section 102(c) of the URAA is directly opposite to the Federal Circuit's interpretation of Section 102(c) of the NAFTA Implementation Act in the instant case. This is clearly shown by the Ninth Circuit's decision in *Bronco Wine Co. v. United States* ("*Bronco Wine*"). In *Bronco Wine*, the plaintiff challenged regulations relating to the labeling of wine that were promulgated by the Bureau of Alcohol, Tobacco and Firearms. 997 F. Supp. 1318, 1319 (E.D. Cal. 1997). The plaintiff brought a cause of action pursuant to the APA to enforce Section 1052(a) of the Lanham Act, which was amended by the implementing legislation for the Uruguay Round Agreements – *i.e.*, the URAA. *Id.* at 1322. In other words, the plaintiff was seeking to bring a cause of action to enforce a provision of the implementing legislation for the Uruguay Round Agreements.

In dismissing the plaintiff's cause of action, the District Court for the Eastern District of California ruled that Section 102(c) of the URAA "clearly and unambiguously" barred the plaintiff from bringing a cause of action under the APA to enforce the provisions of the URAA. *Id.* at 1322. Furthermore, the district court held that

> {i}t is true that generally the APA provides a cause of action for parties who challenge an agency decision as violative of a law. However, in the case at hand, the law which {plaintiff} points to, the {URAA}, *clearly and unambiguously* states that there may be no action by a private party, brought under any law, to enforce its provisions. Simply put, the provisions of the {URAA} which strip private plaintiffs of a cause of action trump the {APA}'s grant of a cause of action.

Id. at 1322 (emphasis added). In an unpublished decision, the Ninth Circuit upheld the district court's determination that causes of action under the APA to enforce provisions found in the URAA were barred. *Bronco Wine Co. v. United States*, 168 F.3d 498 (9th Cir. 1999).[7]

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[7] It should be noted that the plaintiff in *Bronco Wine* submitted a petition for writ of certiorari to this Court. The Solicitor General of the United States ("Solicitor General") opposed the petition. In its *Brief for the Respondents in Opposition*, the Solicitor General fully supported the Ninth Circuit's determination that Section 102(c) of the URAA barred plaintiff's APA cause of action to enforce the implementing

In contrast, in the instant case, the Federal Circuit found that Section 102(c) of the NAFTA Implementation Act did *not* bar causes of action brought to enforce provisions of the NAFTA Implementation Act. *CLTA III*, 517 F.3d at 1341 (App. A at 43a). In so doing, the Federal Circuit dismissed the Ninth Circuit's determination in *Bronco Wine* on two grounds.

First, the Federal Circuit asserted that the Ninth Circuit "conflated" the URAA with the underlying agreements – *i.e.*, the Uruguay Round Agreements – and that Section 102(c) barred causes of action under the agreements but did not bar causes of action to enforce the URAA. In this manner, the Federal Circuit clearly acknowledged that its decision in *CLTA III* was in direct conflict with the Ninth Circuit's holding in *Bronco Wine*. *Id.*; *see also CLTA I*, 425 F. Supp. 2d at 1364 n.40 (App. B at 133a n.40).[8]

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legislation. Solicitor General, *Brief for the Respondents in Opposition*, No. 99-119, 10-11 (Sept. 15, 1999) (App. D at 212a-213a).

[8] In its decision in this case, the CIT went so far as to highlight the possibility of Supreme Court review of this very issue based on the conflict with *Bronco Wine*:

> {t}he court appreciates that the conclusion reached here is contrary to that reached by Judge Coyle in {*Bronco Wine*} which held that the enabling legislation of the {URAA}, 19 U.S.C. § 3512(c), did not create a right of action under the APA. Nevertheless, the United States' judiciary is specifically divided into circuits to foster thoughtful

Second, the Federal Circuit attempted to draw a distinction between the Section 102(c) found in the URAA and the Section 102(c) found in the NAFTA Implementation Act. Specifically, the Federal Circuit stated that "we do not find the *Bronco Wine* decision regarding the URAA to be persuasive in the context of the {NAFTA Implementation Act}, particularly given the clear language of the {NAFTA Implementation Act} itself." *CLTA III*, 517 F.3d at 1341 (App. A at 43a).

However, as shown above, Section 102(c) of the NAFTA Implementation Act and Section 102(c) of the URAA are virtually identical. Thus, there is no valid distinction between the two provisions pursuant to which the Federal Circuit's and Ninth Circuit's decisions can be reconciled. Accordingly, these two Circuits are directly split as to the interpretation of the statutory bar found at Section 102(c) of the URAA and NAFTA Implementation Act.

The Federal Circuit's reliance on the specific statement in Section 101(a) of the NAFTA Implementation Act that it approves the NAFTA also provides no valid basis for distinction. The URAA likewise has a provision (Section 101(a)) that

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discussion of law, while providing uniformity through appellate review by the Supreme Court.

CLTA I, 425 F. Supp. 2d at 1364-65 (App. B at 133a-134a).

specifically states that it approves the Uruguay Round Agreements. *See* 19 U.S.C. 3511(a)(1) (2000) (App. D at 196a). The Ninth Circuit in *Bronco Wine* did not limit the statutory bar only to causes of action seeking to enforce Section 101(a), and the Federal Circuit's attempt to do so here is in direct conflict with the Ninth Circuit's decision.

A Circuit split involving both the URAA and NAFTA Implementation Act alone justifies the Supreme Court granting this Petition for Writ of Certiorari to resolve the conflict and guarantee consistency among the Circuits. Moreover, for the reasons set forth below, the importance of the interpretation of Section 102(c) is in no way limited to just the URAA and the NAFTA Implementation Act.

B. This Circuit Split Impacts *Every Single* Trade Bill Enacted Under Fast Track

The Ninth Circuit's and Federal Circuit's interpretations of the statutory bars found in Section 102(c) of the NAFTA Implementation Act and URAA are in direct conflict. As it stands now, parties can bring APA claims to enforce provisions in the NAFTA Implementation Act and URAA in the Federal Circuit but not the Ninth Circuit.

Furthermore, the split among the Circuits has much broader implications beyond the NAFTA Implementation Act and URAA. The relevant

language subject to conflicting interpretations among the two Circuits – *i.e.*, the language barring actions arising "by virtue of Congressional approval" of the relevant agreement – has been included as a statutory bar to causes of action in *every single* trade bill that has been adopted by Congress pursuant to the fast track mechanism. *See* Figure 1. The split among the Circuits calls into question the interpretation of this provision in each of these trade agreement implementing statutes.

In addition, the split among the Circuits will impact future legislation. For example, Congress currently has before it implementing legislation for the United States-Colombia Trade Promotion Agreement. The proposed implementing legislation for this Agreement includes a statutory bar. And like the NAFTA Implementation Act and the URAA, this statutory bar would prohibit causes of action that arise "under the Agreement or by virtue of Congressional approval thereof." United States-Columbia Trade Promotion Agreement Implementation Act, H.R. 5724, 110th Cong. § 102(c) (Apr. 8, 2008) (App. D at 221a).

Based on the potential impact resulting from conflicting interpretations of this widely used provision, the Court should grant this Petition for Writ of Certiorari.

Figure 1[9]

Implementing Legislation	Date of Enactment	Statutory Bar Language
U.S.-Chile FTA Implementation Act	September 3, 2003	under the Agreement or by virtue of congressional approval thereof.
U.S.-Singapore FTA Implementation Act	September 3, 2003	under the Agreement or by virtue of congressional approval thereof.

[9] United States-Chile Free Trade Agreement Implementation Act, Pub. L. No. 108-77, 117 Stat. 909 (Sept. 3, 2003); United States-Singapore Free Trade Agreement Implementation Act, Pub. L. No. 108-78, 117 Stat. 948 (Sept. 3, 2003); United States-Australia Free Trade Agreement Implementation Act, Pub. L. No. 108-286, 118 Stat. 919 (Aug. 3, 2004); United States-Morocco Free Trade Agreement Implementation Act, Pub. L. No. 108-302, 118 Stat. 1103 (Aug. 17, 2004); Dominican Republic-Central America-United States Free Trade Agreement Implementation Act ("CAFTA"), Pub. L. No. 109-53, 119 Stat. 462 (Aug. 2, 2005); United States-Bahrain Free Trade Agreement Implementation Act, Pub. L. No. 109-169, 119 Stat. 3581 (Jan. 11, 2006); United States-Oman Free Trade Agreement Implementation Act, Pub. L. No. 109-283, 120 Stat. 1191 (Sept. 26, 2006).

U.S.-Australia FTA Implementation Act	August 3, 2004	under the Agreement or by virtue of congressional approval thereof.
U.S.-Morocco FTA Implementation Act	August 17, 2004	under the Agreement or by virtue of congressional approval thereof.
CAFTA Implementation Act	August 2, 2005	under the Agreement or by virtue of congressional approval thereof.
U.S.-Bahrain FTA Implementation Act	January 11, 2006	under the Agreement or by virtue of congressional approval thereof.
U.S.-Oman FTA Implementation Act	September 26, 2006	under the Agreement or by virtue of congressional approval thereof.

C. Other Decisions Demonstrate the Confused State of the Law and the Need for Guidance by this Court

Conflict regarding the interpretation of Section 102(c) of the NAFTA Implementation Act and URAA has not been limited to the instant case and *Bronco Wine*. Indeed, at the Federal Circuit itself, there is conflicting precedent regarding the interpretation of Section 102(c). Specifically, in *Timken Co. v. United States* ("*Timken*"), the Federal Circuit recognized that Section 102(c) of the URAA "bars parties from bringing claims directly against the government on the ground that Commerce acted inconsistently with the {URAA}." 354 F.3d 1334, 1341 (Fed. Cir. 2004). Thus, in clear contrast to the instant case, the Federal Circuit in *Timken* stated that Section 102(c) of the URAA barred causes of action brought to enforce the implementing legislation. The fact that the Federal Circuit has proffered two diametrically opposed interpretations of language that is virtually identical demonstrates the confused state of the law and the need for guidance from this Court.

Moreover, the interpretation of Section 102(c) impacts cases beyond those found in the Federal Circuit and the Ninth Circuit. Specifically, in *Ford Motor Co. v. United States* ("*Ford*"), the plaintiff brought a cause of action pursuant to the APA to contest importer record keeping regulations promulgated by Customs in implementing the NAFTA. 2006 WL 2457521, *1 (E.D. Mich. Aug. 23,

2006). Customs promulgated the regulations at issue in *Ford* pursuant to statutory authorization in the NAFTA Implementation Act. *Id.* Relying extensively on the CIT's holding in *CLTA I*, the District Court for the Eastern District of Michigan found that the plaintiff could proceed on its APA claim to contest Customs' regulations notwithstanding the statutory bar found in Section 102(c). *Id.* at *4. As shown by *Ford*, it is clear that the conflicting interpretations of Section 102(c) of the NAFTA Implementation Act and URAA have consequences extending well beyond the Federal and Ninth Circuits.

Given the confused state of the law on this issue and its widespread importance, a Writ of Certiorari for clarification by this Court is warranted.

D. The Federal Circuit's Interpretation of Section 102(c) Renders Part of The Provision Superfluous Thereby Frustrating Congressional Intent

As shown below, the Federal Circuit's interpretation of Section 102(c) of the NAFTA Implementation Act in this case renders the phrase "by virtue of Congressional approval thereof" wholly superfluous. Consequently, the Court should grant this Petition for Writ of Certiorari so as to correct the Federal Circuit's erroneous decision and afford

meaning and consequence to the terms chosen by Congress in crafting Section 102(c).

In finding that Section 102(c) of the NAFTA Implementation Act did not bar causes of action to enforce Section 408 of the NAFTA Implementation Act, the Federal Circuit held that

> {t}he Domestic Producers contend that the phrase "by virtue of Congressional approval thereof' refers to the entire {NAFTA Implementation Act}, including section 408, and therefore bars the {CWB's} suit. But the express language of the {NAFTA Implementation Act} refutes this position, and makes clear that "Congressional approval" refers only to section 101 of the {NAFTA Implementation Act} and not to the entire act. Section 2 of the {NAFTA Implementation Act} defines "Agreement" to mean "the North American Free Trade Agreement approved by the Congress under section 101(a)." Section 101, in turn, provides that "the Congress approves-(1) the North American Free Trade Agreement...." Therefore section 102(c)'s bar against causes of action based on "the Agreement or by virtue of Congressional approval thereof," *reads most naturally as barring only those suits brought under NAFTA itself or under section 101* of the {NAFTA Implementation Act.} Because this suit does not rely on NAFTA itself or section 101 of the {NAFTA Implementation Act} but

> rather on section 408 of the {NAFTA Implementation Act}, the suit is not barred by section 102(c).

CLTA III, 517 F.3d at 1340 (App. A at 39a) (internal citations omitted) (emphasis added).

In other words, the Federal Circuit found that the prohibition on causes of action that arise "by virtue of Congressional approval thereof" only bars causes of action that arise under Section 101(a) of the NAFTA Implementation Act.[10] However, there are *no* causes of action that could arise under Section 101(a) of the NAFTA Implementation Act that would not already be barred by the separate prohibition in Section 102(c) on causes of action that arise under the "Agreement" – *i.e.*, the NAFTA.

The Federal Circuit did not elaborate on what types of actions it believed might arise under Section

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[10] Section 101(a) of the NAFTA Implementation Act states that

> the Congress approves —
>
> > (1) the North American Free Trade Agreement entered into on December 17, 1992, with the Governments of Canada and Mexico and submitted to the Congress on November 4, 1993; and
> >
> > (2) the statement of administrative action proposed to implement the Agreement that was submitted to the Congress on November 4, 1993.

19 U.S. C. § 3311(a) (2000) (App. D at 196a).

101(a) of the NAFTA Implementation Act yet not be barred by the prohibition on causes of action under the NAFTA. Indeed, there are none. It is interesting to note in this regard that the plaintiffs argued before the Federal Circuit that the "by virtue of Congressional approval thereof" language "ensured that private litigants would not evade the prohibition on bringing a private right of action based on the unenacted provisions of NAFTA by grounding such a claim in congressional approval of NAFTA in Section 101(a) of the {NAFTA Implementation Act}." *See* Combined Opposition Brief for Plaintiff-Appellees Canadian Lumber Trade Alliance, Norsk Hydro Canada, Inc., CWB, Ontario Forest Industries Association, Ontario Lumber Manufacturers Association and The Free Trade Lumber Council, and Opening Brief for Plaintiff-Cross Appellant Government of Canada (May 14, 2007) at 94-95 (App. D at 199a-200a). However, unenacted provisions of the NAFTA are without question part of the "Agreement" and, therefore, are already barred by the language in Section 102(c) foreclosing causes of action that arise under the Agreement.

Because causes of action based on Section 101(a) would already be barred by the prohibition on causes of action under the Agreement, the Federal Circuit's interpretation of Section 102(c) of the NAFTA Implementation Act renders a significant part of the statute superfluous. Specifically, under the Federal Circuit's interpretation, the statutory bar in Section 102(c) against causes of action that

arise "by virtue of Congressional approval thereof" is rendered completely meaningless.

It is well recognized that an interpretation of a statute that renders meaningless even a single word or phrase cannot be sustained. As this Court has repeatedly stated, "{i}t is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (citations omitted). The Court has also stated that "{i}t is our duty 'to give effect, if possible, to every clause and word of a statute,'" and "{w}e are thus 'reluctant to treat statutory terms as surplusage' in any setting." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (citations omitted). This Court should grant this Petition for Writ of Certiorari to afford meaning to all parts of Section 102(c) of the NAFTA Implementation Act as Congress intended.

E. The Federal Circuit's Interpretation of Section 102(c) Is Contradicted by Its Legislative History

The Federal Circuit's interpretation of Section 102(c) of the NAFTA Implementation Act is also contradicted by its legislative history. Specifically, the Federal Circuit's interpretation directly contradicts the legislative history of the provision in the Canadian Free Trade Agreement

Implementation Act ("CFTA Implementation Act") that was the predecessor to Section 102(c) of the NAFTA Implementation Act. Like the NAFTA Implementation Act, Section 102(c) of the CFTA Implementation Act provided that "{n}o person other than the United States shall – have any cause of action or defense under the Agreement or by virtue of congressional approval thereof . . . ." CFTA Implementation Act, Pub. L. No. 100-449, § 102(c), 102 Stat. 1851, 1853 (Sept. 28, 1988) (App. D at 219a). Also like the NAFTA Implementation Act, the CFTA Implementation Act had a provision (Section 101(a)) that specifically stated that it approved the CFTA. According to the Senate Report that accompanied the CFTA Implementation Act, the statutory bar

> provides that no person other than the United States shall have a cause of action or defense under the Agreement or by reason of Congressional approval of the Agreement (the *only exception* is with regard to a constitutional challenge to the binational dispute panel under section 516A(g)(4), *as provided in section 401(c) of the bill*).

CFTA Implementation Act, S. Rep. No. 100-509, at 11 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2395, 2405 (App. D at 220a) (emphasis added).

If, as held by the Federal Circuit here, the phrase "by virtue of Congressional approval thereof" only barred claims pursuant to Section 101(a) of the

implementing legislation, then Congress simply would not have stated that the "only exception" to the statutory bar was set forth in Section 401(c). Rather, the exception proves the general rule – Section 102(c) bars causes of action to enforce provisions in the implementing legislation.

As shown by this legislative history, Congress specifically provided for one and only one exception to the rule that private rights of action to enforce the implementing legislation are barred. The Federal Circuit's decision ignores this clear Congressional intent.

When Congress subsequently approved the NAFTA, it again made clear its intent to bar causes of action to enforce provisions in the implementing legislation. The SAA accompanying the NAFTA Implementation Act provides that Section 102(c)

> does not preclude the exercise of the right to challenge certain provisions of the implementing bill provided for in section 516A(g)(4) of the Tariff Act of 1930 *pursuant to section 414(6) of the implementing bill.*

SAA Accompanying NAFTA Implementation Act, *reprinted in* H.R. Doc. No. 103-159 (I), at 462-63 (App. D at 215a). If Section 102(c) of the NAFTA Implementation Act was intended just to bar a cause of action brought pursuant to Section 101(a) of the implementing legislation, then Congress would have had no need whatsoever to include the exception in

the SAA allowing causes of action pursuant to Section 414(6) of the NAFTA Implementation Act. Again, the exception proves the rule: causes of action to enforce provisions in the implementing legislation are barred by Section 102(c).

Accordingly, the Federal Circuit's decision conflicts with the legislative history underlying Section 102(c) of the NAFTA Implementation Act. This Court should grant this Petition to correct the Federal Circuit's erroneous decision.

F. The Federal Circuit's Interpretation of Section 102(c) is Inconsistent with the Fast Track Mechanism

Under the fast track mechanism, Congress authorizes the President to negotiate trade agreements within certain parameters and, in return, Congress agrees to conduct a simultaneous "up-or-down" vote on the agreement and its implementing legislation with no amendments. *See* 19 U.S.C. § 2191 *et seq.* (2000) (App. D at 184a-192a). In this manner, trade agreements are approved and implemented through a single vote in a single bill. *See* Trade and International Economic Policy Reform Act of 1987, H.R. Rep. No. 100-40 (I), at 48-49 (App. D at 216a-218a). The NAFTA was approved and implemented via fast track in the NAFTA Implementation Act.

Under fast track procedures, there is no distinction between approval and implementation of a trade agreement. Indeed, approval and implementation occur at the same time and in one bill subject to one vote. In other words, as stated above, fast track "effectively merges legislative approval with implementing legislation." *See* Setear, 31 J. Legal Stud. at S29 (App. D at 202a-203a).

Because fast track merges approval with implementation, the prohibition on causes of action that arise "by virtue of" – *i.e.*, because of – congressional approval of the NAFTA necessarily bars a private right of action to enforce the implementing legislation. *Black's Law Dictionary* 201 (6th ed. 1991) (defining "by virtue of"). To hold otherwise would draw an unwarranted distinction between the approval and implementation of the NAFTA.

The Federal Circuit's decision in *CLTA III* is flatly inconsistent with the merging of approval and implementation in the fast track mechanism used to enact the NAFTA Implementation Act. Accordingly, the Court should grant the Petition for Writ of Certiorari to correct this fundamental error.

II. Section 408 is an Impermissible Legislative Entrenchment Provision

As demonstrated below, this Court has consistently observed and reaffirmed the principle that legislative entrenchment provisions are

impermissible.[11] However, the Court has never addressed the issue of whether magic password provisions constitute legislative entrenchment provisions. The instant case squarely presents this issue to the Court for resolution. Moreover, the issue is presented in a critically important context involving Congress' power of the purse. Accordingly, the Court should grant this Petition for Writ of Certiorari to resolve this question.

A. Legislative Entrenchment Provisions are Impermissible

Since its earliest days, this Court has observed the principle that one Congress cannot restrict the powers of a succeeding Congress. *Fletcher v. Peck*, 6 Cranch 87, 135, 3 L.Ed. 162 (1810) (stating that "one legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be controverted."); *see also Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803) (observing that a statute is "alterable when the legislature shall please to alter it."). The Court has continued to reaffirm this principle in more recent cases. *See, e.g., United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (recognizing "the centuries-old concept that one legislature may not bind the legislative authority of its successors."). Furthermore, academia has overwhelmingly

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[11] Provisions that impermissibly restrict the powers of a subsequent Congress are commonly said to represent "legislative entrenchment."

supported the principle that one Congress may not restrict the powers of future Congresses. *See, e.g.*, Laurence H. Tribe, American Constitutional Law § 2-3, 125 n.1 (3d ed. 2000) (App. D at 206a-207a) (stating that "the Constitution limits trans-temporal commandeering of a branch by its current occupants.").

B. The Court Has Never Addressed the Issue of Whether Magic Password Provisions Constitute Legislative Entrenchment Provisions

Magic password provisions require Congress to make a pre-determined express statement in order for a certain event to occur. For example, Section 408 of the NAFTA Implementation Act is a magic password provision in that it requires any amendment to Title VII of the Tariff Act to expressly state that it "applies to goods from Canada" or "applies to goods from Mexico" in order for such amendment to apply to Canadian or Mexican goods. Based on the fact that magic password provisions restrict the method by which a Congress may make future laws, such provisions "raise serious constitutional questions." *Id.*

In previous cases involving magic password provisions, this Court has not had to reach the issue of whether such provisions constitute legislative entrenchment provisions and, therefore, are invalid. For example, in *Marcello v. Bonds*, the Court did not

reach the validity of the magic password provision at issue in that case. 349 U.S. 302, 310 (1955). More recently, in *Lockhart v. United States* ("*Lockhart*"), the Court stated that it "need not decide the effect of {the magic password provision} to resolve this case." 546 U.S. 142, 145 (2005); *see also Lockhart v. United States - Opinion Announcement* at 2:56 to 3:01 *available at*: http://www.oyez.org/cases/2000-2009/2005/2005_04_ 881/opinion/ ("we do not decide if the {magic password provision} is valid.")

Nevertheless, at least one member of the Court has expressed the view that magic password provisions are invalid because they result in legislative entrenchment. *Lockhart*, 546 U.S. at 149 (Scalia, J. concurring). According to Justice Scalia, magic password provisions are invalid legislative entrenchment provisions because "{a}mong the powers of a legislature that a prior legislature cannot abridge is, of course, the power to make its will known *in whatever fashion it deems appropriate*." *Id.* at 148 (emphasis added); *see also* Larry Alexander, Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation* ("Alexander"), 20 Const. Comment. 97, 105 (2003) (App. D at 204a-205a) ("Congress may not force a future Congress to use particular language to legislate."). Magic password provisions like Section 408 of the NAFTA Implementation Act restrict this inherent right of Congressional expression by forcing subsequent Congresses to demonstrate their will in a certain pre-prescribed manner – *i.e.*, the form needed to

satisfy the magic password provision. Alexander, 20 Const. Comment. at 105 (App. D at 204a-205a) (stating that "Congress may {not} require future Congresses to bark like seals prior to legislating"). In other words, because Section 408 forces Congress to bark the words "apply to goods from Canada" and "apply to goods from Mexico" in order for amendments to Title VII of the Tariff Act to apply to such goods, it constitutes an impermissible legislative entrenchment.

Based on the fact that this Court has never addressed the validity of magic password provisions and based on Justice Scalia's concurrence in *Lockhart*, the Courts of Appeals have questioned the continued validity of such provisions. Indeed, as the Ninth Circuit has stated, "it is an open question whether Congress could validly impose such a clear statement rule even if it wanted to do so." *United States v. Novak*, 476 F.3d 1041, 1054 n.12 (9th Cir. 2007) (citing *Lockhart*). Likewise, the United States Court of Appeals for the Eighth Circuit has asked, in light of *Lockhart*, "{w}hether or not the Congress of 1946 may bind the Congress of 1998 to make an 'express statement.'" *Robinette v. Commissioner of I.R.S.*, 439 F.3d 455, 460 (8th Cir. 2006). Based on the uncertainty as to the validity of magic password provisions, this Court should grant this Petition for Writ of Certiorari to resolve this issue.

C. This Case Presents an Ideal Vehicle for the Court to Resolve This Issue

This case presents an ideal vehicle by which the Court can determine if magic password provisions such as Section 408 of the NAFTA Implementation Act constitute impermissible legislative entrenchment provisions. Here, there is no question that absent Section 408, the CDSOA would apply to duties assessed on goods from Canada and Mexico. Thus, this case is an ideal vehicle because the resolution of the case is directly dependent on the Court's answer to this question. Furthermore, this case involves Congress' critically important power of the purse, thereby providing another reason for the Court to grant this Petition for Writ of Certiorari.

One of the most important powers entrusted to a Congress is the power of the purse. *U.S. v. Munoz-Flores*, 495 U.S. 385, 395 (1990); *see also* The Federalist No. 58 359 (C. Rossiter ed. 1961) ("This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."). Section 408 of the NAFTA Implementation Act infringes on this crucial power through its impact on the CDSOA, which represents a decision by Congress as to how to spend and distribute money derived from duties. Specifically, the CDSOA represented Congress' use of the power

of the purse to help U.S. companies affected by either dumped or subsidized imports. Section 408 of the NAFTA Implementation Act impermissibly restricts the Congress that enacted the CDSOA from using its power in this manner.

Moreover, the impact of Section 408 of the NAFTA Implementation Act on Congress' exercise of the power of the purse extends far beyond the CDSOA. For example, in 2006, Congress enacted legislation that, *inter alia*, suspended the ability of certain importers to post a bond, rather than a cash deposit, to cover future duties when importing into the United States. *See* Pension Protection Act of 2006, Pub. L. No. 109-280, § 1632, 120 Stat 780 (2006) (App. D at 209a-211a); 19 U.S.C. § 1675(a)(2)(B)(iii) (2000) (App. D at 177a). Because this legislation amended Title VII of the Tariff Act, but did not expressly say "applies to goods from Canada" or "applies to goods from Mexico," Canadian and Mexican exporters will still have the ability to post bonds rather than make cash deposits of duties under the Federal Circuit's holding in the instant action. Accordingly, the subsequent Congress' desire to exercise the power of the purse by requiring cash deposits rather than bonds is thwarted as to NAFTA imports due to the magic password provision of Section 408 of the NAFTA Implementation Act. Based on Section 408's infringement of Congress' crucial power of the purse, the Court should grant this Petition for Writ of Certiorari.

CONCLUSION

For all of the above-stated reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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May 27, 2008

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Court No. 2006-1622, 2006-1625, 2006-1626, 2006-1627, 2006-1636, 2006-1648

CANADIAN LUMBER TRADE ALLIANCE,
Plaintiff-Appellee,
and

NORSK HYDRO CANADA, INC.,
Plaintiff-Appellee,
and

CANADIAN WHEAT BOARD,
Plaintiff-Appellee,
and

GOVERNMENT OF CANADA,
Plaintiff-Cross Appellant,
and

ONTARIO FOREST INDUSTRIES ASSOCIATION, ONTARIO LUMBER MANUFACTURERS ASSOCIATION, and THE FREE TRADE LUMBER COUNCIL,
Plaintiffs-Appellees,

v.

UNITED STATES,
Defendant-Appellant,
and

COALITION FOR FAIR LUMBER IMPORTS EXECUTIVE COMMITTEE,
Defendant-Appellant,
and

US MAGNESIUM LLC,
Defendant-Appellant,
and

UNITED STATES STEEL CORPORATION,
Defendant-Appellant,
and

U.S. FOUNDRY & MANUFACTURING CO., NEENAH FOUNDRY CO., MUNICIPAL CASTINGS, INC., LEBARON FOUNDRY, INC., EAST JORDAN IRON WORKS, INC., ALLEGHENY LUDLUM CORPORATION, and AK STEEL CORPORATION,
Defendants-Appellants.

Appeal from the United States Court of International Trade in consol. case nos. 1:05-CV-00324, 1:05-CV-00325, 1:05-CV-00326, 1:05-CV-00327, 1:05-CV-00328, Judge Donald C. Pogue

February 25, 2008, Decided

Before MICHEL, Chief Judge, PLAGER, Senior Circuit Judge, and RADER, Circuit Judge.

OPINION

MICHEL, Chief Judge.

This is a trade case concerning the interplay between the North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified at 19 U.S.C. §§ 3301-3473) ("NAFTA Implementation Act" or "NIA"), and the Continued Dumping and Subsidy Offset Act, Pub. L. No. 106-387, § 1003, 114 Stat. 1549, 1623 (2000) ("CDSOA"), *repealed by* the Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601(b), 120 Stat. 4, 154 (2006). We heard argument on December 4, 2007.

The NIA was enacted in 1993. Section 408 of that act provides that any subsequent amendment to certain United States trade laws "shall apply to goods from a NAFTA country only to the extent specified in the amendment." 19 U.S.C. § 3438. The CDSOA, enacted in 2000, amended the trade laws by providing that antidumping and countervailing duties assessed on imported goods--which previously had been placed into the general fund of the United States Treasury--would instead be "distributed on an annual basis . . . to the affected domestic producers for qualifying expenditures." 19 U.S.C. § 1675c (2000). Following enactment of the CDSOA, United States Customs and Border Protection ("Customs") began distributing duties assessed on imported goods, including on goods imported from NAFTA countries Canada and Mexico, to domestic producers.

In 2005, Plaintiffs-Appellees Canadian Lumber Trade Alliance, Norsk Hydro Canada, Inc., Canadian Wheat Board, Ontario Forest Industries Association,

Ontario Lumber Manufacturers Association, The Free Trade Lumber Council (together, the "Canadian Producers"), and Plaintiff-Cross Appellant the Government of Canada sued the United States in the Court of International Trade, alleging that because the CDSOA does not specify that it applies to goods from NAFTA countries, it must be construed (in light of section 408 of the NIA) *not* to apply to goods from NAFTA countries. The Plaintiffs sought, inter alia, a declaratory judgment interpreting the CDSOA in their favor, and an injunction against Customs' continued distribution of duties assessed on softwood lumber, magnesium, and hard red spring wheat from Canada.

Defendants-Appellants Coalition for Fair Lumber Imports Executive Committee, US Magnesium LLC, United States Steel Corp., U.S. Foundry & Manufacturing Co., Neenah Foundry Co., Municipal Castings, Inc., LeBaron Foundry, Inc., East Jordan Iron Works, Inc., Allegheny Ludlum Corp., and AK Steel Corp. (together, the "Domestic Producers") intervened in the litigation, arguing (along with the United States) that the Plaintiffs lacked standing to challenge Customs' CDSOA distributions, had no cause of action, and were wrong on the merits in any event. After briefing and an evidentiary hearing, the Court of International Trade held that the Canadian Producers had standing and a cause of action, that the Government of Canada did not have standing because it had elected to proceed in the World Trade Organization ("WTO"), and that the merits favored the Canadian Producers. *Canadian Lumber Trade Alliance v. United States*, 425 F. Supp. 2d 1321 (Ct. Int'l Trade 2006) ("*CLTA I*"). The Court of

International Trade issued a declaratory judgment holding the CDSOA inapplicable to goods from Canada and Mexico, and granted an injunction against Customs' further distribution of duties assessed on softwood lumber, magnesium, and hard red spring wheat from Canada. *Canadian Lumber Trade Alliance v. United States*, 441 F. Supp. 2d 1259 (Ct. Int'l Trade 2006) ("*CLTA II*").

The United States and the Domestic Producers now appeal the judgment in favor of the Canadian Producers, and the Government of Canada cross-appeals the judgment against it and dismissal of its claims for lack of standing. We have jurisdiction over these appeals under 28 U.S.C. § 1295(a)(5). We affirm the declaratory judgment issued by the Court of International Trade, because at least one Plaintiff-Appellee has standing to seek it, and because the Court of International Trade properly interpreted the CDSOA, in light of section 408 of the NIA, to be inapplicable to goods imported from Canada or Mexico. We also affirm the Court of International Trade's dismissal of the Government of Canada's claims for lack of standing, though we hold that Canada's institution of WTO proceedings did not determine this outcome. Finally, we modify the injunction issued by the Court of International Trade so that it pertains only to hard red spring wheat, because subsequent events have rendered this case moot with respect to the softwood lumber and magnesium industries.

BACKGROUND

A. Relevant Provisions of the NAFTA Implementation Act

The United States entered into the North American Free Trade Agreement ("NAFTA") with Canada and Mexico in December of 1992. Congress passed the NIA in November 1993, President Clinton signed the bill on December 8, 1993, and the NIA was made effective on January 1, 1994. Pub. L. No. 103-182, 107 Stat. 2057 (1993). Section 101 of the NIA contains Congress's approval of the NAFTA treaty, providing that "the Congress *approves*--(1) the North American Free Trade Agreement . . . ." 19 U.S.C. § 3311(a) (emphasis added). Section 102 of the NIA provides that"[n]o person other than the United States--(1) shall have any cause of action or defense under--(A) the Agreement [i.e., NAFTA][1] or by virtue of Congressional *approval* thereof . . . ." 19 U.S.C. § 3312(c) (emphasis added).

Section 408 of the NIA, entitled "[t]reatment of amendments to antidumping and countervailing duty law," lies at the center of this appeal. The entire section reads as follows:

> Any amendment enacted after the Agreement [i.e., NAFTA] enters into force with respect to the United States that is made to—

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[1] Section 2 of the NIA provides that "[t]he term 'Agreement' means the North American Free Trade Agreement approved by the Congress under section 101(a)." 19 U.S.C. § 3301.

> (1) section 303 or title VII of the Tariff Act of 1930 [19 USCS §§ 1671 et seq.], or any successor statute, or
>
> (2) any other statute which—
>
> > (A) provides for judicial review of final determinations under such section, title, or successor statute, or
> >
> > (B) indicates the standard of review to be applied,
>
> *shall apply to goods from a NAFTA country only to the extent specified in the amendment.*

19 U.S.C. § 3438 (emphasis added).

As the Court of International Trade recognized, section 408 of the NIA is a "magic words" rule. "[A]ny amendment to title VII of the Tariff Act of 1930 must contain certain 'magic words' for Congress to indicate that it intends to alter antidumping and countervailing duty laws with respect to NAFTA parties." *CLTA I*, 425 F. Supp. 2d at 1334.

B. The Continued Dumping And Subsidy Offset Act

In 2000, Congress enacted the CDSOA (often referred to as the "Byrd Amendment"). Before passage of the CDSOA, "the duties collected pursuant to the antidumping statute were deposited with the Treasury for general purposes." *Huaiyin*

Foreign Trade Corp. v. United States, 322 F.3d 1369, 1379 (Fed. Cir. 2003). The CDSOA changed this by providing that "[d]uties assessed pursuant to a countervailing duty order, an antidumping duty order, or a finding under the Antidumping Act of 1921 shall be distributed on an annual basis under this section to the affected domestic producers for qualifying expenditures." 19 U.S.C. § 1675c(a) (2000). In other words, the CDSOA "direct[ed] Customs to pay the collected antidumping duties to [domestic producers] harmed by the anticompetitive conduct" rather than to keep the duties within the government. *Huaiyin Foreign Trade Corp.*, 322 F.3d at 1380.

The CDSOA directed the Commissioner of Customs to establish a "special account" for each antidumping or countervailing duty order, and to deposit into each special account all duties collected after October 1, 2000 "under the antidumping order or finding or the countervailing duty order with respect to which the account was established." 19 U.S.C. § 1675c(e)(2) (2000).[2] Every year, the special accounts were to be distributed to "affected domestic producers"[3] who had incurred and claimed "qualifying expenditures." [4]

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[2] CBP regulations provide that when deposits of duties are received by Customs, they are first placed into "clearing accounts," and then the duties are moved into the CDSOA special accounts when the entries are liquidated. *See* 19 C.F.R. § 159.64(a)(2); *id.* § 159.64(b)(ii).

[3] An "affected domestic producer" is "any manufacturer, producer, farmer, rancher, or worker representative (including associations of such persons)" that: (A) supported imposition of the antidumping or countervailing duty order in question

As the Court of International Trade observed, the CDSOA "does not specify that it applies to goods from Canada or Mexico . . . nor did the United States provide advance notice of the [CDSOA] to Canada or Mexico or engage in consultations with regard thereto." *CLTA I*, 425 F. Supp. 2d at 1329. Soon after enactment of the CDSOA, nine countries, including Canada and Mexico, instituted dispute resolution proceedings against the United States in the World Trade Organization, arguing that the CDSOA violated a range of international agreements. A WTO dispute resolution panel, affirmed by the Appellate Body of the WTO, ruled that the United States acted inconsistently with the Uruguay Round Agreements in enacting the CDSOA, and as a remedy authorized the complaining nations to retaliate against the CDSOA by suspending tariff concessions on imports from the United States. *See* Panel Reports, United States-Continued Dumping and Subsidy Offset Act of 2000, WT/DS217/R, WTDS234/R (Sept. 16, 2002); Appellate Body Reports, United States-Continued Dumping and Subsidy Offset Act of 2000, WT/DS217/AB/R, WTDS234/AB/R (Jan. 16, 2003).

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before Commerce; and (B) remains in operation. 19 U.S.C. § 1675c(b)(1) (2000).

[4] A "qualifying expenditure" is "an expenditure incurred after the issuance of the antidumping duty finding or order or countervailing duty order" in one of a number of categories including, inter alia, equipment, research and development, employee health benefits, and working capital. 19 U.S.C. § 1675c(b)(4) (2000).

Congress repealed the CDSOA as part of the Deficit Reduction Act of 2005, which was signed into law on February 8, 2006. *See* Pub. L. No. 109-171, 120 Stat. 4, 154 (2006). The repeal was made effective as of October 1, 2007, but provided that Customs may still distribute "duties on entries of goods made and filed before October 1, 2007." *Id.* § 7601(b).

At various times between enactment of the CDSOA and its repeal, antidumping and countervailing duty orders were in place on softwood lumber, magnesium, and hard red spring wheat from Canada.[5] Pursuant to the CDSOA, Customs distributed duties collected under these antidumping and countervailing duty orders, including duties collected on goods produced or sold by the Canadian Producers, to domestic producers for fiscal years

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[5] *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 36,068 (May 22, 2002); *Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order: Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 36,070 (May 22, 2002); *Final Affirmative Countervailing Duty Determinations: Pure Magnesium and Alloy Magnesium From Canada*, 57 Fed. Reg. 30,946 (Jul. 13, 1992); *Countervailing Duty Orders: Pure Magnesium and Alloy Magnesium From Canada*, 57 Fed. Reg. 39,392 (Aug. 31, 1992); *Antidumping Duty Order: Pure Magnesium From Canada*, 57 Fed. Reg. 39,390 (Aug. 31, 1992); *Final Affirmative Countervailing Duty Determinations: Certain Durum Wheat and Hard Red Spring Wheat from Canada*, 68 Fed. Reg. 52,747 (Sept. 5, 2003); *Notice of Final Determinations of Sales at Less Than Fair Value: Certain Durum Wheat and Hard Red Spring Wheat from Canada*, 68 Fed. Reg. 52,741 (Sept. 5, 2003).

2003, 2004, and 2005. The approximate amounts of CDSOA distributions were as follows: for softwood lumber from Canada, about $ 73,000 for 2003, $ 5.38 million for 2004, and $ 3.28 million for 2005; for magnesium from Canada, about $ 7,800 for 2003, $ 63,400 for 2004, and $ 25,500 for 2005; and for hard red spring wheat from Canada, about $ 127,600 for 2005.[6]

C. Proceedings Below

On April 29, 2005, the Canadian Producers and the Government of Canada filed a total of five complaints against the United States and Customs in the Court of International Trade,[7] alleging that Customs' distribution of duties assessed on imports from Canada was an unlawful agency action within the meaning of the Administrative Procedure Act, 5 U.S.C. § 702, because the CDSOA, when properly interpreted in light of section 408 of the NIA, does not apply to goods from Canada. Each complaint asked the court to issue a declaratory judgment

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[6] *See* Customs CDSOA FY 2003 Final Annual Report, *available at* http://www.customs.gov/xp/cgov/import/add_cvd/cont_dump/cdsoa_03/; Customs CDSOA FY 2004 Annual Report, *available at* http://www.customs.gov/xp/cgov/import/add_cvd/cont_dump/cdsoa_04/; Customs CDSOA FY 2005 Annual Report, *available at* http://www.customs.gov/xp/cgov/import/add_cvd/cont_dump/cdsoa_05/.

[7] Court of International Trade case nos. 1:05-cv-00324-DCP (filed by Canadian Lumber Trade Alliance); 1:05-cv-00325-DCP (filed by Norsk Hydro Canada, Inc.); 1:05-cv-00326-DCP (filed by Canadian Wheat Board); 1:05-cv-00327-DCP (filed by Government of Canada); 1:05-cv-00328-DCP (filed by Ontario Forest Industries Association, et al.).

interpreting the CDSOA and to issue an injunction against further distribution of particular duties. Most of the Complaints also asked the court to instruct Customs to "collect back" particular duties from the domestic producers to whom they had been distributed.[8]

In June of 2005, the parties in each case filed a motion to consolidate the cases. [9] In July of 2005, the Domestic Producers filed motions to intervene, which were granted, and the United States and Domestic Producers moved to dismiss each of the complaints under Court of International Trade Rule 12(b)(1) (lack of subject matter jurisdiction) and Court of International Trade Rule 12(b)(5) (failure to state a claim upon which relief can be granted).

The Court of International Trade granted the motions for consolidation, and the Canadian Producers and Government of Canada moved for summary judgment. The Court of International Trade then construed these motions, as well as the United States' and Domestic Producers' motions to dismiss, as motions for summary judgment or judgment on the agency record. *See* Ct. Int'l Trade Rules 56, 56.1. On March 27 and 28, 2006, the court held a hearing "to resolve any disputed facts related to jurisdiction," *CLTA I*, 425 F. Supp. 2d at 1333. At the hearing, the court heard testimony from two fact

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[8] *See, e.g.*, complaint in case no. 1:05-cv-00324-DCP, at 12.

[9] The United States did not oppose consolidation of the suits brought by the Canadian Producers, but did oppose consolidation of those suits with the suit brought by the Government of Canada.

witnesses, including Neal Fisher, Administrator of the North Dakota Wheat Commission (the only "affected domestic producer" to receive CDSOA distributions of duties assessed on hard red spring wheat from Canada). The court also heard from two expert witnesses, a professor of Economics and a professor of Business Administration, who offered competing views of the likely effects of CDSOA distributions on market conditions.

On April 7, 2006, the Court of International Trade issued an opinion holding that (1) the Canadian Producers had standing because they were likely to be economically injured by the challenged CDSOA distributions and were asserting interests within the "zone of interest" of section 408 of the NIA; (2) the Government of Canada did not have standing because it had elected to pursue a remedy for the challenged CDSOA distributions in the WTO and had been awarded a remedy there; (3) the Canadian Producers had a cause of action under the APA; and (4) Customs' distribution of duties assessed on imports from Canada was unlawful, because the CDSOA must be read in light of section 408 of the NIA not to apply to goods from Canada or Mexico. *CLTA I*, 425 F. Supp. 2d at 1321.

After further briefing concerning remedies, the Court of International Trade issued a second opinion on July 14, 2006, along with a judgment (1) granting the Canadian Producers' motion for judgment on the agency record; (2) denying the Government of Canada's motion for judgment on the agency record; (3) denying the Domestic Producers' and United States' motions for judgment on the agency record as against the Canadian Producers, and granting those

motions as against the Government of Canada; (4) dismissing the Government of Canada's complaint; (5) declaring that pursuant to section 408 of the NIA, the CDSOA does not apply to antidumping and countervailing duties assessed on imports of goods from Canada or Mexico; and (6) enjoining Customs from making any continued CDSOA distributions to the extent they derive from duties assessed pursuant to countervailing duty orders, antidumping duty orders, or findings under the Antidumping Act of 1921, upon softwood lumber, magnesium, or hard red spring wheat from Canada. *CLTA II*, 441 F. Supp. 2d at 1259; Ct. Int'l Trade Consol. Ct. No. 05-00324, slip. op. 06-104 (Judgment, Jul. 14, 2006). The Court of International Trade declined to instruct Customs to "collect back" any duties already distributed, however. The United States and Domestic Producers then filed timely appeals, and the Government of Canada filed a timely cross-appeal.

D. Developments Outside the Proceedings Below

During and after pendency of the proceedings below, a number of important developments occurred in the softwood lumber, magnesium, and hard red spring wheat industries. Developments after July 14, 2006, are not reflected in the record before the Court of International Trade, but we may consider them insofar as they bear on issues such as mootness. *Cf. Borlem S.A.-Empreedimentos Industriais v. United States*, 913 F.2d 933, 939 (Fed. Cir. 1990) ("[A] reviewing court is not precluded . . . from considering events which have occurred between the date of an agency (or trial court) decision and the date of decision on appeal.").

1. Softwood Lumber

On September 12, 2006, about two months after the Court of International Trade rendered judgment in this case, the United States and Canada signed the Softwood Lumber Agreement 2006 ("SLA 2006"). *See Softwood Lumber Agreement Between the Government of Canada and the Government of the United States of America*, art. III (Sept. 12, 2006), as amended by *Agreement Between the Government of the United States of America and the Government of Canada Amending the Softwood Lumber Agreement Between the Government of the United States of America and the Government of Canada Done at Ottawa on 12 September 2006* (Oct. 12, 2006).

On October 12, 2006, pursuant to the SLA 2006, the United States revoked the antidumping and countervailing duty orders on softwood lumber from Canada, effective retroactively to their May 22, 2002 issue date, "without the possibility of reinstatement."[10] The Department of Commerce also instructed Customs to "cease collecting cash deposits [of antidumping and countervailing duties], as of October 12, 2006, on imports of softwood lumber products from Canada," to liquidate all unliquidated entries subject to the revoked orders without regard to antidumping or countervailing

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[10] *See Notice of Rescission of Countervailing Duty Reviews and Revocation of Countervailing Duty Order: Certain Softwood Lumber Products From Canada*, 71 Fed. Reg. 61,714 (Oct. 19, 2006); *Notice of Rescission of Antidumping Duty Reviews and Revocation of Antidumping Duty Order: Certain Softwood Lumber Products From Canada*, 71 Fed. Reg. 61,714 (Oct. 19, 2006).

duties, and to "refund all deposits collected on such entries with accrued interest" to the importers of record.[11]

2. Magnesium

On July 6, 2006, shortly before entry of the Court of International Trade's judgment below, Customs revoked the countervailing duty orders on pure and alloy magnesium from Canada.[12] On October 31, 2006, Norsk Hydro Canada, Inc., the only Canadian Producer in the magnesium industry, announced plans to close its only magnesium plant in Canada during the first half of 2007.

3. Hard Red Spring Wheat

On February 16, 2006, Customs revoked the antidumping and countervailing duty orders on hard red spring wheat from Canada, effective January 2, 2006.[13] The North Dakota Wheat Commission, the only "affected domestic producer" to receive CDSOA

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[11] *See* sources cited at n.10, *supra*.

[12] *See Revocation of the Countervailing Duty Orders: Pure Magnesium and Alloy Magnesium from Canada*, 71 Fed. Reg. 38,382 (Jul. 6, 2006) (effective Aug. 16, 2005). The antidumping order on pure magnesium had been revoked in 2004. *See Pure Magnesium From Canada; Notice of NAFTA Binational Panel's Final Decision, Amended Final Results of Full Sunset Review and Revocation of Antidumping Duty Order*, 69 Fed. Reg. 70,649 (Dec. 7, 2004) (effective Aug. 1, 2000).

[13] *Antidumping Duty Investigation and Countervailing Duty Investigation of Hard Red Spring Wheat from Canada: Notice of Panel Decision, Revocation of Countervailing and Antidumping Duty Orders and Termination of Suspension of Liquidation*, 71 Fed. Reg. 8,275 (Feb. 16, 2006) (effective Jan. 2, 2006).

distributions derived from duties collected under these orders, was the only entity to claim "qualifying expenditures" pertaining to these orders for fiscal year 2006.[14] According to counsel for the United States, the North Dakota Wheat Commission could obtain up to $ 180,000 in further distributions under the CDSOA, but for the Court of International Trade's judgment in this case.[15]

DISCUSSION

A. Standard of Review

We review the Court of International Trade's interpretation of a statute, which is a matter of law, *de novo*. *Brother Int'l Corp. v. United States*, 464 F.3d 1319, 1324 (Fed. Cir. 2006). We review the court's factual determinations for clear error. *Better Home Plastics Corp. v. United States*, 119 F.3d 969, 971 (Fed. Cir. 1997). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Russell Stadelman & Co. v. United States*, 242 F.3d 1044, 1048 (Fed. Cir. 2001) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948)).

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[14] *See* Customs CDSOA FY 2006 Certifications Received Report, *available at* http://www.cbp.gov/linkhandler/cgov/import/add_cvd/cont_dump/cdsoa_06/fy06_certs.ctt/fy06_certs.pdf.

[15] Oral argument at 6:50, *available at* http://www.cafc.uscourts.gov/oralarguments/mp3/2006-1622.mp3.

We review Article III standing, a threshold jurisdictional issue and a question of law, *de novo*, *see S. Cal. Fed. S&L Ass'n v. United States*, 422 F.3d 1319, 1328 (Fed. Cir. 2005), but "[t]o the extent jurisdictional facts are in dispute, however, the findings of fact are reviewed for clear error." *Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989).

When reviewing a decision of the Court of International Trade in a suit brought pursuant to 28 U.S.C. § 1581(i), we apply the standard of review set forth by the Administrative Procedure Act, and will "hold unlawful and set aside [Customs'] action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2); *Dixon Ticonderoga Co. v. United States*, 468 F.3d 1353, 1354 (Fed. Cir. 2006).

B. Standing

The Constitution "limits the judicial power of the United States to the resolution of 'Cases' and 'Controversies.'" *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2562, 168 L. Ed. 2d 424 (2007) (quoting U.S. Const. art. III, § 2, cl. 1). There is no case or controversy within the meaning of the Constitution unless the plaintiff has standing, as the Supreme Court has explained.

> [T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or

> imminent, not 'conjectural' or 'hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (citations omitted).

Because standing is "an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Id.* at 561. Allegations alone may suffice to establish standing at the pleading stage, but must be supported with evidence at later stages of the litigation. *Id.*; *accord DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 126 S. Ct. 1854, 1861 n.3, 164 L. Ed. 2d 589 (2006) ("the party asserting federal jurisdiction when it is challenged has the burden of establishing it").

Beyond this "irreducible constitutional minimum" of Article III standing, a plaintiff who brings claims under the Administrative Procedure Act ("APA") must also have prudential standing. As the Supreme Court has explained, prudential standing concerns "the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the

statute or constitutional guarantee in question." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970).

Here, the Court of International Trade held that the Canadian Producers possess standing, but that the Government of Canada does not because it elected to seek a remedy for its injury in the World Trade Organization. *CLTA I*, 425 F. Supp. 2d at 1335-54. On appeal, the Domestic Producers and the United States argue that the Canadian Producers have neither constitutional nor prudential standing, while the Government of Canada argues on cross-appeal that it possesses both types. We affirm that the Government of Canada lacks standing, though not because it instituted WTO proceedings, and we affirm that the Canadian Wheat Board has standing. We need not address the standing of any other Plaintiff because, even assuming that the other Canadian Producers had standing in the Court of International Trade, their claims are now moot as we discuss below.

1. Canadian Wheat Board--Article III Standing

The parties frame their constitutional-standing dispute as a question of whether empirical evidence was necessary to demonstrate injury-in-fact in this case, or whether the Court of International Trade was correct to invoke the doctrine of "competitor standing," which relies on economic logic to conclude that a plaintiff will likely suffer an injury-in-fact when the government acts in a way that increases competition or aids the plaintiff's competitors. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 433,

118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998) (The Supreme Court "routinely recognizes probable economic injury resulting from [governmental actions] that alter competitive conditions as sufficient to satisfy the [Article III 'injury-in-fact' requirement]," and any party "who is likely to suffer economic injury as a result of [governmental action] that changes market conditions satisfies this part of the standing test." (citing 3 K. Davis & R. Pierce, Administrative Law Treatise 13-14 (3d ed. 1994))). *See also Ass'n of Data Processing Serv. Orgs., Inc.*, 397 U.S. at 152 (holding that data processing companies had standing to challenge a ruling by the Comptroller of the Currency allowing banks to provide data processing services); *accord Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 46, 91 S. Ct. 158, 27 L. Ed. 2d 179 (1970); *Investment Co. Institute v. Camp*, 401 U.S. 617, 620, 91 S. Ct. 1091, 28 L. Ed. 2d 367 (1971) ("[I]t is urged at the outset that petitioners lack standing to question whether national banks may legally enter a field in competition with them. This contention is foreclosed by [*Data Processing*].").

Here, the Canadian Producers alleged that they (or their constituent members) compete directly with United States producers to whom (or to whose surrogates) Customs distributed money under the CDSOA. By using antidumping and countervailing duties imposed on Canadian goods to subsidize these U.S. competitors rather than for some other purpose, the Canadian Producers argued, Customs made it very likely that the Canadian Producers would suffer economic injury in the form of increased competition. To support this argument, the Canadian Producers

presented expert testimony to the Court of International Trade concerning the types of economic injury that were likely to result from government subsidization of a competitor. The United States and Domestic Producers presented countervailing expert testimony, but the Court of International Trade was "persuaded by the Canadian Producers' arguments that there will likely be some injury as a result of the distributions." *CLTA I*, 425 F. Supp. 2d at 1347.

On appeal, the United States and Domestic Producers argue that the Court of International Trade erred by failing to require an empirical analysis linking specific CDSOA distributions to specific, demonstrated economic harms (e.g., lost sales, decreased market share). Only with such an analysis, this argument proceeds, could the Canadian Producers have proven an injury-in-fact that is "concrete and particularized," and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560.

We do not agree. One purpose of the injury-in-fact requirement, as the Court of International Trade explained, is "to ensure that the plaintiffs have a stake in the fight and will therefore diligently prosecute the case . . . while, at the same time, ensuring that the claim is not abstract or conjectural so that resolution by the judiciary is both manageable and proper." *CLTA I*, 425 F. Supp. 2d at 1336 (citing *United Food & Commer. Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 556, 116 S. Ct. 1529, 134 L. Ed. 2d 758 (1996)) (other citations omitted). Therefore, as the Third Circuit has noted, "[i]njury-in-fact is not Mount Everest."

Danvers Motor Co. v. Ford Motor Co., 432 F.3d 286, 294 (3d Cir. 2005). Rather, a plaintiff may establish its injury-in-fact "in the same way as any other matter on which the plaintiff bears the burden of proof." *Lujan*, 504 U.S. at 561.

Here, the Court of International Trade conducted a two-day evidentiary hearing devoted to the question of injury-in-fact. The Canadian Producers needed only to establish that it was more likely than not they would be injured by the challenged CDSOA distributions, and they could fairly employ economic logic toward that end even though empirical analysis might conceivably have provided a higher level of certainty.[16] *See Adams v. Watson*, 10 F.3d 915, 923 (1st Cir. 1993) ("[B]asic economic theory quite consistently transcends utter randomness by positing elemental laws of cause and effect predicated on actual market experience and *probable* market behavior. Indeed, most 'competitor standing' cases depend on such core economic postulates.") (emphasis in original).[17]

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[16] Given the sizes of the relevant markets and of the relatively modest CDSOA distributions challenged here, and given that money is fungible, it may well be that empirical analysis could not have provided any more certainty in this case, as the Court of International Trade recognized. *See CLTA I*, 425 F. Supp. 2d at 1347 ("tracing where [CDSOA] distributions are used is a difficult, if not impossible, assignment"); *id.* at 1349 n.26 ("the effect of subsidies may not be immediately clear; rather, the full effect of a subsidy may not be felt for years").

[17] Of course, the United States and Domestic Producers were entitled to attempt to rebut such arguments from economic logic by showing that "core economic postulates" do not apply straightforwardly in the relevant markets, e.g., because the government has changed the rules of the game by tightly

Although the doctrine of "competitor standing" is not yet well-developed in our Circuit, we note that the D.C. Circuit repeatedly has applied the doctrine to hold that "parties suffer constitutional injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition." *La. Energy & Power Auth. v. FERC*, 329 U.S. App. D.C. 401, 141 F.3d 364, 367 (D.C. Cir. 1998). *See also New World Radio, Inc. v. FCC*, 352 U.S. App. D.C. 366, 294 F.3d 164, 172 (D.C. Cir. 2002) (explaining that D.C. Circuit applies "'competitor standing' doctrine to an agency action that itself imposes a competitive injury, i.e., that *provides benefits to an existing competitor* or expands the number of entrants in the petitioner's market.") (emphasis added); *U.S. Telecom Ass'n v. FCC*, 353 U.S. App. D.C. 59, 295 F.3d 1326, 1331 (D.C. Cir. 2002) ("regulatory decisions that permit subsidization of some participants in a market can have the requisite injurious impact on those participants' competitors").

In this case, the Canadian Wheat Board is not a textbook candidate for "competitor standing," but the doctrine is instructive nonetheless. The Canadian Wheat Board sells hard red spring wheat. The North Dakota Wheat Commission, the only recipient of the CDSOA distributions challenged by the Canadian Wheat Board (i.e., the antidumping and countervailing duties assessed on hard red

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regulating the markets. *Accord Adams*, 10 F.3d at 925 ("We in no way suggest, of course, that the second amended complaint's portrayal of milk industry economics is beyond refutation either on summary judgment or at trial.").

spring wheat from Canada), is an organization which "*promotes the sale* of [hard red spring] wheat on behalf of farmers in North Dakota and sponsors research on [hard red spring] wheat," but does not itself sell wheat. *CLTA I*, 425 F. Supp. 2d at 1348 (emphasis added). *Cf. Adams*, 10 F.3d at 922 (competitor standing is "premised on a plaintiff's *status* as a *direct competitor* whose position in the relevant marketplace would be affected adversely by the challenged governmental action") (emphasis in original). Further, the research sponsored by the North Dakota Wheat Commission is non-proprietary, and thus may inure to the benefit of the Canadian Wheat Board as well as North Dakota wheat producers.

However, the Court of International Trade found that the North Dakota Wheat Commission's promotional activities have "helped to take back market share from Canadian Wheat in specific export markets," *CLTA I*, 425 F. Supp. 2d at 1348, and the United States and Domestic Producers have not established that this factual finding was clearly erroneous. Loss of market share is certainly an economic injury,[18] and it is quite rational to infer that Customs, by distributing money to an entity that aims to take away market share from Canadian wheat and has already been somewhat successful in that effort, is likely to inflict further economic injury on the Canadian Wheat Board. Indeed, fewer inferences are required to find injury-in-fact in this

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[18] *See, e.g., Adams*, 10 F.3d at 922 ("it is 'obvious' that appellants would sustain direct economic harm commensurate with the diminution of their current market share").

case than in most "competitor standing" cases, where it is *presumed* (i.e., without affirmative findings of fact) that a boon to some market participants is a detriment to their competitors.

The United States and Domestic Producers argue that the North Dakota Wheat Commission has yet to spend any of the money it has received under the CDSOA, and that therefore any injury to be suffered by the Canadian Wheat Board as a result of CDSOA distributions is not an "imminent" injury as required by Article III. We disagree. The Administrator of the North Dakota Wheat Commission testified that the reason this money has yet to be spent is "the continued uncertainty involved" in this litigation, and that "[d]ue to that uncertainty, [the wheat commissioners] told us to place [the money] in the cash reserve and leave it alone until we had more certainty." The United States and Domestic Producers cannot rely on the pendency of this lawsuit to argue that a threatened harm is not imminent. *See, e.g., Eckles v. City of Corydon*, 341 F.3d 762, 768 (8th Cir. 2003) ("The City has stated that it will only abstain from enforcing the notice while the suit is pending. . . [and] if the suit is dismissed Eckles could expect the City to enforce the notice. . . . [Therefore] [t]he threat of injury to Eckles is imminent and concrete.").

Because the Court of International Trade was correct to conclude, given its findings of fact, that Customs' distribution of money to the North Dakota Wheat Commission under the CDSOA was likely to cause an economic injury to the Canadian Wheat Board, and because this injury would be prevented by a declaratory judgment and injunction against

such distribution, the Court of International Trade was correct to hold that the Canadian Wheat Board has constitutional standing to seek declaratory and injunctive relief.

2. Canadian Wheat Board--prudential standing

The Court of International Trade was also correct to hold that the Canadian Wheat Board has prudential standing under the APA. A plaintiff has prudential standing if "the interest sought to be protected by the [plaintiff] is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Serv. Orgs., Inc.*, 397 U.S. at 154. The Supreme Court has explained that this "zone of interest" test "is not meant to be especially demanding," and, "[i]n cases where the plaintiff is not itself the subject of the contested regulatory action," the test is satisfied unless "the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399, 107 S. Ct. 750, 93 L. Ed. 2d 757 (1987).

Here, although the Canadian Wheat Board alleges a violation of the CDSOA, the Canadian Wheat Board seeks the protection of section 408 of the NIA. We have explained that "[b]y passing the NAFTA Implementation Act, Congress . . . created for importers of goods from one of the three signatory countries the right to preferential tariff treatment." *Xerox Corp. v. United States*, 423 F.3d 1356, 1364 (Fed. Cir. 2005). Section 408 embodies

one form of preferential tariff treatment–it *conditions*, on specific legislative pronouncement, the United States' ability to amend certain trade laws as applied to "goods from a NAFTA country." *See* 19 U.S.C. § 3438; *CLTA I*, 425 F. Supp. 2d at 1354 ("[T]he apparent purpose of Section 408 is to protect Canadian and Mexican importers from some statutory alterations of the competitive environment contemplated by the antidumping and countervailing duty laws in effect as of January 1, 1994.") The Canadian Wheat Board markets goods from Canada, a NAFTA country, and therefore has an interest in preferential tariff treatment. Its interests are clearly *not* "so marginally related to or inconsistent with the purposes implicit in [section 408] that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke*, 479 U.S. at 399.

The United States and Domestic Producers assert that neither the NIA nor its legislative history evidences any Congressional intent to give foreign producers a right to sue for violations of section 408. But "there need be no indication of congressional purpose to benefit the would-be plaintiff," Clarke, 479 U.S. at 399-400, because the review provisions of the APA are "generous." *Ass'n of Data Processing Serv. Orgs., Inc.*, 397 U.S. at 156. Therefore, we affirm that "there are no prudential standing restraints to bar [the Canadian Wheat Board's] claims here." *CLTA I*, 425 F. Supp. 2d at 1354.

3. Government of Canada--Article III Standing

We also affirm that unlike the Canadian Wheat Board, the Government of Canada does not have

standing, though we do not rely on the Court of International Trade's analysis to reach this result. First, we note that the Government of Canada disclaims derivative standing–i.e., standing based on injury to the Canadian Producers–and argues instead that it is independently injured by the challenged CDSOA distributions. The Court of International Trade concluded that, even assuming such injury, the Government of Canada does not have standing here because it elected to challenge the CDSOA in the WTO and was successful in that forum. *CLTA I*, 425 F. Supp. 2d at 1351 ("by pursuing its action before the WTO, Canada has elected this remedy at the expense of others").

On appeal, both the Government of Canada and the United States argue that the Court of International Trade's reliance on election was erroneous. We agree. Election may arise in the jurisdictional context if a plaintiff is entitled to prosecute a claim in one of two fora. Having chosen one forum, the plaintiff may not proceed *on the same claim* in the other forum. *See, e.g., Bonneville Assocs. v. United States*, 43 F.3d 649, 653 (Fed. Cir. 1994) ("Courts have consistently interpreted the [Contract Disputes Act] as providing the contractor with an either-or choice of forum. Thus, once a contractor makes a binding election to appeal the [contracting officer's] final decision to a board of contract appeals or to the Court of Federal Claims, the contractor can no longer pursue its claim in the other forum.") (internal citation omitted).

Here, however, the Government of Canada does not seek to litigate the same claim in two fora. In the WTO, Canada joined with nine other countries to

claim that Congress' passage of the CDSOA violated a range of international agreements signed by the United States. *See* Dispute Resolution Body, Panel Reports, United States-Continued Dumping and Subsidy Offset Act of 2000, WT/DS217/R, WTDS234/R (Sept. 16, 2002); Appellate Body, Appellate Body Reports, United States-Continued Dumping and Subsidy Offset Act of 2000, WT/DS217/AB/R, WTDS234/AB/R (Jan. 16, 2003). In this case, by contrast, the Government of Canada claims that Customs' distribution of certain duties to domestic producers violates domestic law (i.e., the CDSOA itself, when properly interpreted in light of section 408 of the NIA). The Court of International Trade was not deprived of jurisdiction over Canada's *statutory* claim merely because Canada had chosen to enforce international *agreements* in the WTO. *Cf. Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 76, 119 S. Ct. 391, 142 L. Ed. 2d 361 (1998) ("In rejecting the argument that the doctrine of election of remedies barred the Title VII lawsuit, we reasoned that a grievance is designed to vindicate a 'contractual right' under a [collective bargaining agreement], while a lawsuit under Title VII asserts 'independent statutory rights accorded by Congress.'" (explaining Court's holding in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 39, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974))).

Nevertheless, the burden still falls on the Government of Canada to show that it has standing–independent of any injury to the Canadian Producers–to challenge Customs' interpretation of the CDSOA. The Government of Canada advances

three theories of standing, none of which are sufficient under Article III.

First, the Government of Canada argues that it is injured by the denial of its statutorily granted rights under section 408 of the NIA, and that Congress has granted Canada a "procedural right" to standing under the Court of International Trade's jurisdictional statute, 28 U.S.C. § 1581(i)(4) (which provides that the Court of International Trade has exclusive jurisdiction over actions against the United States that "arise[] out of any law of the United States providing for . . . administration and enforcement with respect to" tariffs and duties on imports). Canada relies on *Massachusetts v. EPA*, in which the Supreme Court held that the state of Massachusetts had standing to challenge the Environmental Protection Agency's denial of Massachusetts' rulemaking petition (seeking federal regulation of automobile greenhouse gas emissions under the Clean Air Act). 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007). The Court held that Massachusetts had standing in part because Congress had enacted a "procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious," in 42 U.S.C. § 7607(b)(1) (which provides that "[a] petition for review of action of [certain EPA decisions] . . . may be filed only in the United States Court of Appeals for the District of Columbia"). *EPA*, 127 S. Ct. at 1454. Here, the Government of Canada asserts, Congress has enacted an analogous "procedural right" in 28 U.S.C. § 1581(i)(4), under which Canada has standing to enforce section 408 of the NIA.

However, the Supreme Court in *EPA* stressed that the result in that case depended heavily on "the special position and interest of Massachusetts," and explained that "States are not normal litigants for the purposes of invoking federal jurisdiction." *EPA*, 127 S. Ct. at 1454.

> When a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted.

Id.

The Government of Canada is not fairly analogous to a State of the Union in this analysis. Although Canada surely made concessions to the United States in negotiating the NAFTA treaty,[19] Canada has not truly surrendered any sovereign prerogatives, such as the ability to negotiate a resolution of this dispute with the United States or the ability to defend itself. Therefore the Government of Canada is not entitled to "special

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[19] For example, Canada agreed to enact its own domestic implementation of NAFTA, presumably including preferential tariff treatment for imports from the United States.

solicitude in [the] standing analysis," as was given to Massachusetts. *EPA*, 127 S. Ct. at 1455.

Canada's second theory of standing fails for similar reasons. Analogizing itself to Native American tribes, the Government of Canada argues that it has standing because it is a sovereign seeking to protect its sovereign interests. But to the extent that Native American tribes are entitled to any "special solicitude" regarding standing, here the Government of Canada has not established that it is similarly situated. *See, e.g., United States v. Creek Nation*, 295 U.S. 103, 110, 55 S. Ct. 681, 79 L. Ed. 1331, 81 Ct. Cl. 973 (1935) (tribe "was in a state of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests"); *Begay v. Albers*, 721 F.2d 1274, 1281 (10th Cir. 1983) ("the United States Government, out of solicitude for the welfare of its Indian wards, undertook by Treaties, statutes and executive orders to establish legal relations to protect the Indian wards").

Finally, the Government of Canada argues that even if its sovereignty does not confer special status for purposes of standing, Canada has still been deprived of the benefit of section 408 of the NIA, and is as entitled as an individual or corporation to challenge regulatory action that interferes with enjoyment of bargained-for benefits. The problem with this theory is that, having disclaimed reliance on any economic injury to the Canadian Producers, the Government of Canada does not explain what benefit it has been deprived of–i.e., what *injury* it has suffered. *Cf. Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 413, 62 S. Ct. 1194, 86 L. Ed. 1563 (1942) (complaint alleged that

"appellant's ability to conduct its business and maintain its public broadcasting service is seriously impaired and the [challenged] regulations will make the operation of appellant's business more costly, reduce its earnings and render its property and business less valuable"); *Idaho Power Co. v. FERC*, 354 U.S. App. D.C. 85, 312 F.3d 454, 460 (D.C. Cir. 2002) (explaining that because "contract duration is a measure of value," appellant "suffered a cognizable injury when it was compelled to forgo a 10-year contract . . . and instead enter a shorter-term contract with its associated market risks").

Because the Government of Canada has not demonstrated an injury-in-fact independent of injury to the Canadian Producers, and is not entitled to special solicitude that would temper the injury-in-fact requirement, the Government of Canada does not have independent standing under Article III to challenge Customs' interpretation of the CDSOA.[20]

C. Mootness

Though standing and the "case or controversy" requirement are most frequently analyzed with respect to the initiation of litigation, "[t]he standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997). If a plaintiff's claims cease to present a "case or controversy" due to developments during litigation, those claims become

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[20] Therefore we need not address Canada's prudential standing under the APA and § 408 of the NIA.

moot. "One commentator has defined mootness as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'" *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980) (quoting Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L. J. 1363, 1384 (1973)); *see also Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 478, 110 S. Ct. 1249, 108 L. Ed. 2d 400 (1990) (plaintiff "must continue to have a personal stake in the outcome of the lawsuit") (internal citation omitted).

Here, the Domestic Producers argue that the claims of Canadian Producers in the softwood lumber and magnesium industries are moot. The Canadian Lumber Trade Association and Norsk Hydro Canada, Inc. do not contest this argument.[21] We agree that, even assuming the Canadian Producers in the softwood lumber and magnesium industries had standing in the Court of International Trade under the doctrine of "competitor standing," their claims have been mooted by subsequent developments.

In their complaints below, the softwood lumber and magnesium Canadian Producers asked the Court of International Trade for both prospective relief (a declaratory judgment and an injunction),

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[21] *See* Fed. Cir. Case no. 2006-1622, Docket Entry 112 (letter of counsel advising that "the Canadian Lumber Trade Alliance, Norsk Hydro Canada, Inc., and the Canadian Wheat Board do not intend to contest the mootness of this action as it pertains to the softwood lumber and magnesium industries").

and retrospective relief (instructions to Customs to "collect back" duties already distributed). However, the Court of International Trade granted only prospective relief, *see CLTA II*, 441 F. Supp. 2d at 1268, and the Canadian Producers have not cross-appealed the court's denial of retrospective relief. Therefore, each Canadian Producer only "continue[s] to have a personal stake in the outcome of the lawsuit" if there are any duties, assessed on goods from Canada, that have yet to be distributed to a competitor of that Canadian Producer under the CDSOA, and that would be distributed but for the judgment below.

The Canadian Producers in the softwood lumber industry cannot meet this standard because there are no longer any duties on softwood lumber from Canada remaining to be distributed under the CDSOA. Pursuant to the SLA 2006, Customs has retroactively revoked the antidumping and countervailing duty orders on softwood lumber from Canada, liquidated all relevant entries without collecting antidumping or countervailing duties, and refunded all such duties in Customs' possession to the importers of record. With no threat of further challenged distributions, there is no threat of further injury to the Canadian Producers in the softwood lumber industry. Therefore we hold that the claims of the Canadian Lumber Trade Alliance, Ontario Forest Industries Association, Ontario Lumber Manufacturers Association, and The Free Trade Lumber Council for declaratory and injunctive relief are moot.

The sole Canadian Producer from the magnesium industry, Norsk Hydro Canada, Inc., cannot show a

continued "personal stake" in this suit for a different reason. Having chosen to exit the magnesium industry, Norsk Hydro Canada will no longer compete with "affected domestic producers" of magnesium. Even if there are duties assessed on magnesium from Canada that remain to be distributed by Customs under the CDSOA, Norsk Hydro Canada can no longer argue that it will likely suffer competitive injury as a result of those distributions. Therefore, we hold that the claims of Norsk Hydro Canada, Inc. for declaratory and injunctive relief are moot.

No party has argued that the claims of the Canadian Wheat Board are moot, and counsel for the United States represented at oral argument that but for the Court of International Trade's judgment below, Customs could further distribute as much as $180,000 to the North Dakota Wheat Commission under the CDSOA. Therefore, we hold that the claims of the Canadian Wheat Board for declaratory and injunctive relief are not moot, and we turn to the substance of this dispute. *See Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) (only one plaintiff need have standing for a court to consider the case); *accord Citizens United for Free Speech II v. Long Beach Twp. Bd. of Comm'rs*, 802 F. Supp. 1223, 1231 (D.N.J. 1992) ("To obtain injunctive or declaratory relief, it is sufficient that there be at least one plaintiff with standing.").[22]

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[22] The Canadian Wheat Board does not have standing to seek an injunction against distribution of duties assessed on softwood lumber or magnesium, however. Therefore we will modify the Court of International Trade's injunction to apply

D. Cause of Action

We next consider whether the Canadian Wheat Board has a cause of action. The Domestic Producers argue that even assuming standing, the claims of the Canadian Wheat Board are barred by section 102(c) of the NIA, which provides that "[n]o person other than the United States--(1) shall have any cause of action or defense under--(A) the Agreement or by virtue of Congressional approval thereof . . . ." 19 U.S.C. § 3312(c). As noted above, the Canadian Wheat Board instituted this suit under section 702 of the Administrative Procedure Act ("APA").

> The APA confers a general cause of action upon persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, but withdraws that cause of action to the extent the relevant statute "[precludes] judicial review," 5 U.S.C. § 701(a)(1). Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its

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only to duties assessed on hard red spring wheat from Canada. *Cf. Forest Labs., Inc. v. Ivax Pharms., Inc.*, 501 F.3d 1263, 1265 (Fed. Cir. 2007) ("We affirm the district court's entry of judgment on validity and its entry of an injunction as to both Ivax and Cipla, but we modify the injunction to apply only to escitalopram oxalate.").

> objectives, its legislative history, and the nature of the administrative action involved.

Block v. Cmty. Nutrition Inst., 467 U.S. 340, 345, 104 S. Ct. 2450, 81 L. Ed. 2d 270 (1984).

Beginning with express statutory language, we observe that section 102(c) of the NIA bars claims brought "under . . . the Agreement or by virtue of Congressional approval thereof." 19 U.S.C. § 3312(c). The Domestic Producers contend that the phrase "by virtue of Congressional approval thereof" refers to the entire NIA, including section 408, and therefore bars the Canadian Wheat Board's suit. But the express language of the NIA refutes this position, and makes clear that "Congressional approval" refers only to section 101 of the NIA and not to the entire act. Section 2 of the NIA defines "Agreement" to mean "the North American Free Trade Agreement *approved by the Congress under section 101(a)*." 19 U.S.C. § 3301 (emphasis added). Section 101, in turn, provides that "the Congress *approves*--(1) the North American Free Trade Agreement . . . ." 19 U.S.C. § 3311(a) (emphasis added). Therefore section 102(c)'s bar against causes of action based on "the Agreement or by virtue of Congressional approval thereof," reads most naturally as barring only those suits brought under NAFTA itself or under section 101 of the NIA. Because this suit does not rely on NAFTA itself or section 101 of the NIA, but rather on section 408 of the NIA, the suit is not barred by section 102(c).

The structure of the NIA does not weigh against this conclusion. The Domestic Producers argue that

because the NIA was enacted through the "fast track" process–wherein Congress combines into a single "implementing bill" its approval of a trade agreement and any legislation necessary to implement the United States' obligations under the agreement–therefore the phrase "Congressional approval" must be construed to refer to the entirety of the bill. But even the law governing the "fast track" mechanism carefully distinguishes between Congressional "approval" and other, substantive provisions of an implementing bill, explaining that an implementing bill for a trade agreement must contain both "a provision *approving* such trade agreement," and "if changes in existing laws or new statutory authority is required *to implement such trade agreement* . . ., provisions, necessary and appropriate to implement such trade agreement . . ., either repealing or amending existing laws or providing new statutory authority." 19 U.S.C. § 2191(b)(1) (emphasis added).

In the case of the NIA, section 101 is clearly the "provision approving" NAFTA, while section 408 is a provision changing existing law to implement a requirement of NAFTA; namely, NAFTA Art. 1902.2(a), which provides in part that while each NAFTA party "reserves the right to change or modify its antidumping law or countervailing duty law," such changes "shall apply to goods from another [NAFTA] Party only if the amending statute specifies that it applies to goods from that Party or from the Parties to this Agreement." *Compare* § 408 of the NIA (certain subsequent amendments "shall apply to goods from a NAFTA country only to the extent specified in the amendment").

The Domestic Producers also argue that their interpretation of section 102(c) is supported by the legislative history of a parallel provision in an earlier bill implementing the Canadian Free Trade Agreement ("CFTA," a precursor to NAFTA). In particular, they point to a Senate Report stating that section 102(c) of the CFTA Implementation Act "deal[s] with the question of whether this Agreement [i.e., CFTA] *or this bill* creates a private right of action to challenge Government action on the ground that it is inconsistent with the obligations of the United States *under the Agreement*." CAFTA Implementation Act, S. Rep. No. 100-509, at 11 (1988) (emphasis added). Here, however, the Canadian Producers do not base their claims on the obligations of the United States "under [an] Agreement" (in this case, NAFTA), but on the obligations of the United States under *domestic law*; namely, section 408 of the NIA. More importantly, the legislative history of the NIA–the statute actually at issue here–supports the Court of International Trade's construction. *See* Statement of Administrative Action ("SAA"), H.R. Doc. No. 103-159(I), at 450, 462 (explaining that section 102(c) of the NIA precludes "private right[s] of action based on the NAFTA, or on Congressional approval of the Agreement *in section 101(a)*") (emphasis added); H.R. Rep. No. 103-361(I), at 18 (1993), *reprinted in* 1993 U.S.S.C.A.N. 2552, 2568 (section 102(c) contains a "general prohibition on private right[s] of action arising from the NAFTA, the supplemental agreements, or approval of the NAFTA by Congress *under section 101(a) of the bill*") (emphasis added).

The Domestic Producers further argue that their interpretation of section 102(c) is supported by past judicial consideration of a parallel provision in the Uruguay Round Agreements Act ("URAA").[23] In *Bronco Wine Co. v. United States Department of Treasury*, 997 F. Supp. 1318 (E.D. Cal. 1997), a district court considered section 102(c) of the URAA, which provides that no person except the United States "shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement." 19 U.S.C. § 3512(c). The district court held that this section "clearly and unambiguously states that there may be no action by a private party, brought under any law, to enforce [the] provisions [of the URAA]." *Bronco Wine*, 997 F. Supp. at 1322. The Ninth Circuit affirmed in an unpublished opinion, writing that the plaintiff's claims were barred because "no one other than the United States shall have a cause of action under the [Uruguay Round] Agreement." *Bronco Wine Co. v. BATF*, No. 98-15444, 1999 U.S. App. LEXIS 2130, at *2 (9th Cir. Feb. 11, 1999), *cert. denied*, 528 U.S. 950, 120 S. Ct. 371, 145 L. Ed. 2d 290 (1999) (brackets in original, emphasis added, internal quotation omitted) (unpublished).

It appears that the Ninth Circuit in *Bronco Wine* may have conflated the URAA with the Uruguay Round Agreements, affirming the district court's

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[23] As the Supreme Court noted in *Block*, "congressional acquiescence" to "judicial construction [of a statute as] barring review" may be evidence that Congress intended the statute to bar review. 467 U.S. at 349.

dismissal of claims brought under the URAA on the grounds–true but irrelevant–that section 102(c) bars claims brought under the Agreements themselves. *Compare NSK Ltd. v. United States*, 346 F. Supp. 2d 1312, 1322 (Ct. Int'l Trade 2004) (holding that where plaintiff challenged Commerce's interpretation of a United States statute, section 102(c) of the URAA was an "erroneous technical bar" that did not prohibit the suit). But in any event, we do not find the Bronco Wine decision regarding the URAA to be persuasive in the context of the NIA, particularly given the clear language of the NIA itself, as discussed above. Therefore we hold that section 102(c) of the NIA does not bar the Canadian Wheat Board's cause of action here.

E. Merits – Interpretation of the CDSOA

Having held that the Canadian Wheat Board has standing and a cause of action, we turn finally to the merits of its claim that the CDSOA must be read, in light of section 408 of the NIA, *not* to apply to goods from Canada or Mexico. To review, section 408 provides in relevant part that "[a]ny amendment enacted after the Agreement [i.e., NAFTA] enters into force with respect to the United States that is made to . . . title VII of the Tariff Act of 1930 . . . shall apply to goods from a NAFTA country only to the extent specified in the amendment." 19 U.S.C. § 3438. It is quite clear that the CDSOA, enacted six years after the NIA, amended title VII of the Tariff Act of 1930. *See* Pub. L. No. 106-387, § 1003(a), 114 Stat. 1549, 1549A-73 (enacting the CDSOA) ("Title VII of the Tariff Act of 1930 is amended by inserting after section 753 the following new section . . . ."). It is also clear that the CDSOA does not specifically

refer to NAFTA, the NIA, Canada, or Mexico. *See id.*; 19 U.S.C. § 1675c (2000). Therefore, the Court of International Trade concluded, "based on Congress' plain language in Section 408 [of the NIA], Customs is not authorized to apply the [CDSOA] to goods from Canada or Mexico." *CLTA I*, 425 F. Supp. 2d at 1373.

The Domestic Producers now offer a barrage of arguments against this result. Most, if not all, were well-addressed and rejected by the Court of International Trade in its exhaustive opinion, *see id.* at 1366-73, and we adopt that court's reasoning and conclusions here without repeating all of them. Broadly, the Domestic Producers argue that the CDSOA is not subject to the "magic words" rule of section 408 because (1) the CDSOA does not "apply to goods" within the meaning of section 408; (2) the CDSOA supercedes section 408; or (3) the CDSOA is an exercise of Congress' spending power and cannot be challenged by foreign entities.

Starting with the words of section 408, the Domestic Producers contend that the statute affects subsequent trade amendments only insofar as they "apply to goods," and that the CDSOA falls outside this reach because it applies to *money* (i.e., duties assessed on imported goods) rather than to goods. But while it is true that the CDSOA does not regulate goods directly, such as by flatly prohibiting their sale or use, the CDSOA surely does "apply to goods" in the sense relevant to antidumping and countervailing duty laws, which are designed to regulate the *market* for goods in an attempt to compensate for anti-competitive behavior. *See, e.g.*, *Dixon Ticonderoga Co. v. United States*, 468 F.3d

1353, 1356 (Fed. Cir. 2006) ("it is true that the CDSOA is intended to protect domestic producers"). And it is exactly the antidumping and countervailing duty laws that are circumscribed by section 408. *See* SAA, H. R. Doc. No. 103-159(I), at 203 (1993). ("Section 408 of the bill implements the requirement of Article 1902 [of NAFTA] that amendments to the AD and CVD laws shall apply to a NAFTA country only if the amendment so states explicitly."). Therefore the CDSOA does not escape section 408 merely by virtue of the language, "apply to goods." [24]

The Domestic Producers next argue that although the CDSOA does not specify that it applies to goods from NAFTA countries, neither does the statute specify that it does *not* so apply, and therefore we must infer from this silence that Congress intended the CDSOA to apply to goods from NAFTA countries regardless of section 408 of the NIA. In other words, the Domestic Producers claim that Congress' silence was the result of a deliberate judgment to supercede section 408 (or at least that section 408 was inapplicable). But we have explained that "[f]or a later statute to be held implicitly to supercede an apparently inconsistent earlier enactment, the intent of Congress must be apparent in the circumstances." *Sw. Marine of San Francisco, Inc. v. United States*, 896 F.2d 532, 533

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[24] Indeed, as the Court of International Trade observed, § 408 uses the phrase "apply to goods," not to distinguish goods from money, but to clarify a rule of origin, i.e., that the concern of this statute is the operation of AD and CVD laws respecting imports *from NAFTA countries*, as opposed to imports *by NAFTA-party nationals* from any country. *CLTA I*, 425 F. Supp. 2d at 1367.

(Fed. Cir. 1990); *cf. United States v. United Cont'l Tuna*, 425 U.S. 164, 168, 96 S. Ct. 1319, 47 L. Ed. 2d 653 ("It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored."). Here, the much simpler inference to draw from Congress' silence–and the only reasonable inference, if we are to draw one at all–is that Congress, being aware of its earlier enactment of section 408 of the NIA,[25] chose not to supercede section 408 nor to exempt the CDSOA from it.

Indeed, this simpler inference is bolstered by the fact that Congress was *not* silent when, years before the CDSOA, Congress enacted a different statute amending title VII of the Trade Act of 1930; namely, the URAA. *See* Pub. L. No. 103-465, 108 Stat. 4901 (URAA § 234) (1994) ("Pursuant to article 1902 of the North American Free Trade Agreement and section 408 of the North American Free Trade Agreement Implementation Act, the amendments made by this title shall apply with respect to goods from Canada and Mexico."). Given that Congress had demonstrated its ability to specify a statute's applicability to NAFTA parties–and indeed to make explicit reference to section 408–it is unreasonable to infer that Congress meant for the CDSOA to apply to Canadian and Mexican goods but also decided that a specific reference to this effect was unnecessary.

Finally, the Domestic Producers argue that the CDSOA was enacted as part of an appropriations

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[25] "We presume that Congress is knowledgeable about existing law pertinent to legislation it enacts." *Bristol-Myers Squibb Co. v. Royce Lab.*, 69 F.3d 1130, 1136 (Fed. Cir. 1995) (internal quotation omitted).

bill, and was therefore an exercise of Congress' spending power that was only tangentially related to title VII of the Tariff Act of 1930 and is outside the reach of section 408. Once antidumping and countervailing duties are assessed, the Domestic Producers claim, those duties become the property of the United States, to dispose of as the United States chooses without interference by foreign entities. This argument has no traction, however, because the Canadian Wheat Board does not challenge Congress' spending authority or its choices thereunder. Rather, the Canadian Wheat Board challenges Customs' distribution of duties on the ground that they are inconsistent with Congress's intention as expressed in the CDSOA and section 408 of the NIA.

It is true that the CDSOA directs Customs to distribute money that has been received into the United States Treasury, and in this sense the statute bears the hallmark of a spending bill. But it is certainly not a general appropriation. The statute specifically directs the creation of "special accounts," separate from the Treasury's general fund, and provides that assessed duties are to be deposited into the special accounts and distributed therefrom to affected domestic producers. 19 U.S.C. § 1675c(e) (2000). Duties only reach the Treasury's general fund, if at all, after an antidumping or countervailing duty order has been revoked and money remains unclaimed in the corresponding special account for ninety days thereafter. *Id.* § 1675c(e)(4) (2000).

Further, as the Court of International Trade correctly observed, "the language of Section 408 does not speak to the type of Congressional authority

invoked, but to the laws to which amendments are to be made." *CLTA I*, 425 F. Supp. 2d at 1373. Though Congress *might* have exercised its spending power to assist domestic producers without also amending title VII of the Tariff Act of 1930, and though the Canadian Wheat Board *might* not have had any recourse to challenge Customs' actions in that event, Congress did in fact choose to enact the CDSOA as an amendment to the trade laws, subject to the constraints imposed by section 408 of the NIA. Therefore the Canadian Wheat Board does in fact have recourse to challenge Customs' actions in this case.

CONCLUSION

We AFFIRM the Court of International Trade's judgment granting the motion of the Canadian Wheat Board for judgment on the agency record, and denying the motions of the United States and Domestic Producers for judgment on the agency record as against the Canadian Wheat Board;

We VACATE the Court of International Trade's judgment granting the motions of the Canadian Lumber Trade Alliance, Ontario Forest Industries Association, Ontario Lumber Manufacturers Association, The Free Trade Lumber Council, and Norsk Hydro Canada, Inc. (together, the "Lumber And Magnesium Plaintiffs") for judgment on the agency record, and denying the motions of the United States and Domestic Producers for judgment on the agency record as against the Lumber And Magnesium Plaintiffs, and we REMAND with

instructions to dismiss the complaints of the Lumber And Magnesium Plaintiffs; [26]

We AFFIRM the Court of International Trade's judgment denying the motion of the Government of Canada for judgment on the agency record, granting the motions of the United States and Domestic Producers for judgment on the agency record as against the Government of Canada, and dismissing the Government of Canada's complaint;

We AFFIRM the Court of International Trade's declaratory judgment that, pursuant to Section 408 of the NIA, the CDSOA does not apply to antidumping and countervailing duties assessed on imports of goods from Canada or Mexico; and

We AFFIRM the Court of International Trade's entry of a permanent injunction, but modify that injunction by striking the words "softwood lumber from Canada," and "and magnesium from Canada."

AFFIRMED-IN-PART; VACATED-IN-PART; and REMANDED

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[26] *See Arizonans for Official English*, 520 U.S. at 71 ("When a civil case becomes moot pending appellate adjudication, 'the established practice . . . in the federal system . . . is to reverse or vacate the judgment below and remand with a direction to dismiss.'" (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39, 71 S. Ct. 104, 95 L. Ed. 36 (1950))).

APPENDIX B

UNITED STATES COURT OF INTERNATIONAL TRADE

Slip Op. 06-48
Consol. Ct. No. 05-00324

CANADIAN LUMBER TRADE ALLIANCE; NORSK HYDRO CANADA, INC.; CANADIAN WHEAT BOARD; ONTARIO FOREST INDUS. ASS'N; ONTARIO LUMBER MFGS ASS'N; THE FREE TRADE LUMBER COUNCIL;	)
and	)
THE GOVERNMENT OF CANADA,	)
Plaintiffs,	)
v.	)
THE UNITED STATES OF AMERICA; DEBORAH J. SPERO, ACTING COMMISSIONER, UNITED STATES CUSTOMS & BORDER PROTECTION; and UNITED STATES CUSTOMS & BORDER PROTECTION,	)
Defendants,	)
and	)

COALITION FOR FAIR LUMBER IMPS. EXECUTIVE COMM.; U.S. MAGNESIUM, LLC; UNITED STATES STEEL CORP.; U.S. FOUNDRY & MFG. CO.; NEENAH FOUNDRY CO.; ALLEGHENY LUDLUM CORP; AK STEEL CORP.; EAST JORDAN IRON WORKS, INC.; LEBARON FOUNDRY CORP.; MUNICIPAL CASTINGS, INC.; and NORTH DAKOTA WHEAT COMM'N;	)
Defendant-Intervenors.	)

April 7, 2006, Decided

OPINION

POGUE, Judge: This case presents two key questions: First, whether domestic law authorizes the Government of Canada and/or its exporters to challenge in this court the administration of the United States' trade laws, particularly the Continued Dumping and Subsidy Offset Act of 2000, Pub. L. No. 106-387, § 1003, 114 Stat. 1549, 1623 (2000) codified at 19 U.S.C. § 1675c (the "Byrd Amendment"). The United States Bureau of Customs and Border Protection ("Customs" or "Defendant" or "Commissioner"),[1] relying on the Byrd Amendment, distributes to domestic producers

[1] In this opinion, the term Defendants refers to Defendant and Defendant-Intervenors. The court has attempted, when possible, to properly attribute arguments.

who are competitors of the Plaintiff Canadian exporters the duties collected as a result of antidumping and countervailing orders on Canadian goods. If Plaintiffs are authorized to challenge the Defendant's implementation of the Byrd Amendment by bringing this action, the second issue is whether Customs is authorized to distribute funds collected from duty orders on Canadian (and Mexican) imports of goods where the Byrd Amendment does not specifically so direct.

For the reasons stated below, the court finds that the Plaintiff Canadian exporters, but not the Government of Canada, are authorized to bring this action, and that Customs has violated U.S. law, specifically a provision of the NAFTA Implementation Act in applying the Byrd Amendment to antidumping and countervailing duties on goods from Canada and Mexico, 19 U.S.C. § 3438.

BACKGROUND

A.

In the early 1990's, the United States, Canada and Mexico negotiated, and signed, the North American Free Trade Agreement ("NAFTA"). *See* North American Free Trade Agreement Implementation Act Statement of Administrative Action ("SAA"), reprinted in H. R. Doc. No. 103-159, p. 1 (1993); *Xerox Corp. v. United States*, 423 F.3d 1356, 1358 (Fed. Cir. 2005); *Made in the USA Found. v. United States*, 242 F.3d 1300, 1302-03 (11th Cir. 2001). NAFTA aims to achieve "the liberalization of trade in goods and services, removal of barriers to investment, [and] the protection and enforcement of

intellectual property rights[.]" SAA, reprinted in H. R. Doc. No. 103-159, p. 3 (1993).

As is relevant here, NAFTA allows the United States (and the other NAFTA parties) to amend their antidumping and countervailing duty laws "provided that . . . . [any] amendment shall apply to *goods* from another Party *only* if the amending statute specifies that it applies to goods from that Party or from the Parties to this Agreement." North American Free Trade Agreement, art. 1902(2)(a) (1993) (entered into force Jan. 1, 1994) (*reprinted in* Jackson, *et al, 2002 Documents Supplement to Legal Problems of International Economic Relations* at 512 (4th ed. 2002)) (emphasis added).[2] NAFTA further

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[2] Article 1902 provides:

> Retention of Domestic Antidumping Law and Countervailing Duty Law
>
> 1. Each Party reserves the right to apply its antidumping law and countervailing duty law to goods imported from the territory of any other Party. Antidumping law and countervailing duty law include, as appropriate for each Party, relevant statutes, legislative history, regulations, administrative practice and judicial precedents.
>
> 2. Each Party reserves the right to change or modify its antidumping law or countervailing duty law, provided that in the case of an amendment to a Party's antidumping or countervailing duty statute:
>
> (a) such amendment shall apply to goods from another Party only if the amending statute specifies that it applies to goods from that Party or from the Parties to this Agreement;
>
> (b) the amending Party notifies in writing the Parties to which the amendment applies of the amending statute as far in advance as possible of the date of enactment of such statute;

requires that, if the United States does amend its antidumping or countervailing duty laws as to goods from Canada or Mexico: (1) it will notify "in writing the Parties to which the amendment applies of the amending statute as far in advance as possible of the date of enactment of such statute," (2) it will consult with the affected party before adopting the amending statute, and (3) any such amendment may not run counter to the General Agreement on Tariffs and Trade ("GATT") or the principles of NAFTA. *Id.* at art. 1902(2)(b) – (d).

> (c) following notification, the amending Party, on request of any Party to which the amendment applies, consults with that Party prior to the enactment of the amending statute; and
>
> (d) such amendment, as applicable to that other Party, is not inconsistent with
>
> > (i) the General Agreement on Tariffs and Trade (GATT), the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (the Antidumping Code) or the Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (the Subsidies Code), or any successor agreement to which all the original signatories to this Agreement are party, or
> >
> > (ii) the object and purpose of this Agreement and this Chapter, which is to establish fair and predictable conditions for the progressive liberalization of trade between the Parties to this Agreement while maintaining effective and fair disciplines on unfair trade practices, such object and purpose to be ascertained from the provisions of this Agreement, its preamble and objectives, and the practices of the Parties.

Congress approved NAFTA in the North American Free Trade Agreement Implementation Act ("NAFTA Implementation Act") which also amended U.S. law to reflect the NAFTA framework. NAFTA Implementation Act, Pub. L. No. 103-182, 107 Stat. 2060-2164 (1993), codified at 19 U.S.C. §§ 3301-3473 (2000). Specifically, in implementing NAFTA art. 1902, Section 408 of the NAFTA Implementation Act, codified at 19 U.S.C. § 3438 ("Section 408"), provides that "any amendment . . . [to] title VII of the Tariff Act of 1930 [19 U.S.C. §§ 1671 *et seq.*], or any successor statute . . . shall apply to goods from a NAFTA country only to the extent specified in the amendment." The NAFTA Implementation Act, including 19 U.S.C. § 3438, became effective January 1, 1994.

B.

Subsequent to the passage of the NAFTA Implementation Act, in 2000, Congress amended Title VII of the Tariff Act of 1930 with the passage of the Byrd Amendment, 19 U.S.C. § 1675c. The passage of the Byrd Amendment was intended to strengthen the remedial purposes of the antidumping and countervailing duty laws.[3]

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[3] In adopting the Byrd Amendment, Congress made the following specific findings:

(1) Consistent with the rights of the United States under the World Trade Organization, injurious dumping is to be condemned and actionable subsidies which cause injury to domestic industries must be effectively neutralized.

(2) United States unfair trade laws have as their purpose the restoration of conditions of fair trade so that jobs and investment that should be in the United States are not lost through the false market signals.

Specifically, prior to the Byrd Amendment, under Title VII of the Tariff Act of 1930, Customs collected antidumping and countervailing duties on dumped and subsidized imports, implementing such orders to attempt to neutralize the distortive and adverse effects of dumping and subsidization; Customs then deposited all revenues collected from these duties into the U.S. Treasury, from which the duties were available to pay for general government expenses. *See generally* 21A Am Jur 2d, Customs Duties and Import Regulations § 221 (2004) ("In general, all receipts from customs must be promptly paid into the Treasury.").

After the Byrd Amendment's passage, Customs still collects antidumping and countervailing duties that attempt to neutralize the distortive and adverse effects of dumping and subsidization, but now, following the Byrd Amendment, Customs deposits

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(3) The continued dumping or subsidization of imported products after the issuance of antidumping orders or findings or countervailing duty orders can frustrate the remedial purpose of the laws by preventing market prices from returning to fair levels.

(4) Where dumping or subsidization continues, domestic producers will be reluctant to reinvest or rehire and may be unable to maintain pension and health care benefits that conditions of fair trade would permit. Similarly, small businesses and American farmers and ranchers may be unable to pay down accumulated debt, to obtain working capital, or to otherwise remain viable.

(5) United States trade laws should be strengthened to see that the remedial purpose of those laws is achieved.

Continued Dumping and Subsidy Offset Act of 2000, Pub. L. No. 106-387, § 1(a), § 1002, 114 Stat. 1549, 1549A-72 (2000).

all duties collected into "special accounts" established within the U.S. Treasury for each antidumping and countervailing duty order. 19 U.S.C. § 1675c(e); 19 C.F.R. § 159.64.[4] In addition, each year, Customs distributes all monies contained in those special accounts, plus interest, on a *pro rata* basis, to "affected domestic producers," *i.e.*, companies (who continue to produce the subject merchandise under the antidumping or countervailing duty order) and worker groups that supported the petition for the antidumping or countervailing duty order. The funds distributed, known as the "continued dumping and subsidy offset," 19 U.S.C. § 1675c(a); 19 C.F.R. § 159.61(a) ("Byrd Distributions"), are intended to strengthen trade law remedies, through an allocation based on "qualifying expenditures," *i.e.*, certain enumerated business expenses such as manufacturing facilities, equipment, input materials, health benefits for employees, and "working capital or other funds needed to maintain production," paid by affected domestic producers, 19 U.S.C. §§ 1675c(b)(4); 1675c(d)(2) – (3); 19 C.F.R. § 159.61(c).

On February 8, 2006, President Bush signed the Deficit Reduction Act of 2005 repealing the Byrd Amendment. *See*, Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601(b), 120 Stat. 4, 154

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[4] Customs deposits monies into special accounts only after the entries of the goods have been liquidated, *i.e.*, final duties have been collected and deposited. Prior to liquidation, Customs deposits all monies collected, *i.e.*, cash deposits, in clearing accounts. *See* 19 C.F.R. § 159.64(a). When goods are liquidated, the money in the clearing accounts are transferred to special accounts. *See* 19 C.F.R. § 159.64(b).

(2006). As provided by this repeal: "All duties on entries of goods made and filed before October 1, 2007, that would, but for [the repeal]" be distributed will continue to be distributed under the Byrd Amendment, 19 U.S.C. § 1675c." *Id.*

C.

The Byrd Amendment does not specify that it applies to goods from Canada or Mexico, *see* 19 U.S.C. § 1675c, nor did the United States provide advance notice of the Byrd Amendment to Canada or Mexico or engage in consultations with regard thereto.

Seeking to challenge the Byrd Amendment, and alleging that the Byrd Amendment violated the Uruguay Round Agreements,[5] Canada and Mexico joined with nine other foreign governments in bringing a claim against the United States before the Dispute Resolution Body of the World Trade Organization ("WTO").[6] In the proceedings, both a panel of the Dispute Resolution Body, Panel Reports, *United States–Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R, WTDS234/R (Sept. 16, 2002), and the Appellate Body, Appellate Body Reports, *United States–Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R,

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[5] The Uruguay Round Agreements are the most recent completed trade agreements conducted under the GATT (now the WTO).

[6] The other complaining nations were Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea, and Thailand. *See* Decision by the Arbitrator, *United States – Continued Dumping and Subsidy Offset Act of 2000*, P1.2 n.3, WT/DS234/ARB/CAN (Aug. 31, 2004).

WTDS234/AB/R (Jan. 16, 2003), ruled against the United States, determining that the Byrd Distributions were inconsistent with the Uruguay Round Agreements.[7]

Pursuant to the WTO adjudication, and after consultation and arbitration, the WTO authorized the complaining nations to suspend tariff concessions and other obligations in an amount equal to a portion of the prior Byrd Distributions which the WTO had determined to be improper. Decision by the Arbitrator, *United States – Continued Dumping and Subsidy Offset Act of 2000*, P5.2, WT/DS234/ARB/CAN (Aug. 31, 2004). Specifically, the WTO authorized Canada to suspend tariff concessions in an amount equal to 72% of the value of the United States' annual Byrd Distributions during fiscal 2004, *id.*, that percentage having been determined to be "the extent to which

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[7] Specifically, the Panel found that the Byrd Amendment was not a specific, and therefore actionable, subsidy. *United States–Continued Dumping and Subsidy Offset Act of 2000*, PP7.115-16, WT/DS217/R, WTDS234/R. This conclusion was not appealed. However, the WTO Appellate Body found that the Byrd Amendment was a "specific action against dumping' and a "specific action against a subsidy" not taken in accordance with GATT 1994. *United States–Continued Dumping and Subsidy Offset Act of 2000*, P318, WT/DS217/AB/R, WTDS234/AB/R. Thus, while finding that the Byrd Distributions were not specific subsidies, the WTO found that Byrd Distributions were injurious to importers. *See, e.g., United States–Continued Dumping and Subsidy Offset Act of 2000*, P256, WT/DS217/AB/R, WTDS234/AB/R. The court provides this only as background information; the remainder of the court's opinion relies exclusively on U.S. law and principles pertaining thereto.

disbursement under the [Byrd Amendment] affected exports" from Canada, *id.* at P3.76. Additionally, Canada is authorized to suspend tariff concessions, and other obligations, totaling 72% of the value of distributions made by the United States for all years subsequent to 2004 (as annually calculated by the arbitrator). *Id.* at P5.1. Pursuant to this authorization, Canada imposes a 15% surtax on imports of live swine, cigarettes, oysters, and certain speciality fish, from the United States. *See* International Trade Canada, *Trade Negotiations and Agreements: Dispute Settlement* (2005), http://www.dfait-maeci.gc.ca/tna- nac/disp/factsheet-en.asp. The WTO has also approved Mexico's suspension of trade concessions authorizing Mexico to impose tariffs ranging from 9% to 30% on imports of chewing gum and candy, dairy, blends used for products such as baby formula, and various wines from the United States. *See* Decreto por el que se modifica temporalmente el articulo 1 el Decreto por el que se establece la Tasa Aplicable durante 2003 del Impuesto General de Importacion para las mercancias originarias de America del Norte publicado el 31 diciembre de 2002 por lo que respecta para las mercancias originarias de EE.UU [Decree temporarily modifying various tariff rates applied to North American goods], Diario Oficial de la Federacion [D.O.], 17 de Agosto de 2005 (Mex.) (2005) at 68-69, *available at* http://gobernacion.gob.mx/dof/2005/agosto/dof_17-08-2005.pdf.

D.

Plaintiffs in this case are producers and exporters of goods from Canada (collectively "Canadian

Producers") and the Government of Canada ("Canada"); the Canadian Producers were all subject to countervailing and antidumping duty orders at one point of time since the passage of the Byrd Amendment and are direct competitors with recipients of Byrd Distributions, *see, e.g.*, Allan Decl., Pl.'s Ex. 1 at 4; Vincent Decl., Pl.'s Ex. 2 at 4; Milton Decl., Pl.'s Ex. 3 at 3; LaFlamme Decl., Pl.'s Ex. 4 at 5; Beudry Decl., Pl.'s Ex. at 10; Thompson Decl., Pl.'s Ex. at 3. The Government of Mexico has also participated in these proceedings as an amicus curiae.

Plaintiffs the Canadian Lumber Trade Alliance, the Ontario Forest Industry Association, the Ontario Lumber Manufacturers Association, and the Free Trade Lumber Council ("Lumber Plaintiffs")[8] all represent Canadian Producers and exporters of softwood lumber whose imports into the United States are currently subject to antidumping and countervailing duty orders. *See Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 36,068 (Dep't Commerce May 22, 2002) (notice of amended final determination of sales at less than fair value and antidumping duty order), *Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 36,070 (Dep't Commerce May 22, 2002) (notice of amended final affirmative countervailing duty determination

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[8] The parties do not dispute, and the court does not challenge, that these associations have standing on behalf of their members. *See generally Automobile Workers v. Brock*, 477 U.S. 274 282, 106 S. Ct. 2523, 91 L. Ed. 2d 228 (1986); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 346, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977).

and notice of countervailing duty order). Based on these orders and pursuant to the Byrd Amendment, the Commissioner distributed $ 3,278,700.42 to 106 affected domestic producers in 2005, $ 5,378,612.97 to 126 affected domestic producers in 2004, and $ 73,422.34 to at least 102 affected domestic producers in 2003. Revised Jt. Stip. Undisp. Facts at 6, Ex. 1 to Pl.'s Status Report Regarding a Revised Stmt. Undisp. Mat. Facts (Jan. 20, 2006) ("Pl.'s Stip. Facts"); Jt. Stip. Undisp. Mat. Facts at para. 8-9 (Nov. 17, 2005) ("Def.-Int.'s Stip. Facts"). In addition, in accordance with these orders, Customs is currently holding cash deposits of $4,189,827,439.59 (as of October 1, 2005) from entries of imports awaiting liquidation. Pl.'s Stip. Facts at 10.

Plaintiff Norsk Hydro Canada Inc. ("Norsk") is a producer and exporter of pure and alloy magnesium ingots. Norsk's imports into the United States are currently subject to countervailing duties pursuant to *Pure Magnesium and Alloy Magnesium From Canada*, 57 Fed. Reg. 39,392 (Dept. Commerce August 31, 1992) (countervailing duty order). The Commissioner has distributed $ 25,486.40 in 2005, $ 63,405.69 in 2004, and $ 7,787.58 in 2003 to U.S. Magnesium (or its predecessor), Norsk's domestic competitor. Pl.'s Stip. Facts at 6-7; Def.-Int.'s Stip Facts at para. 10.[9] Under this order, Customs holds cash deposits (as of October 1, 2005) of $ 6,328,090.94. Pl.'s Stip. Facts at 10.

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[9] There are numerous other orders on related products from Canada that are not detailed here.

Plaintiff the Canadian Wheat Board purchases hard red spring wheat from Canadian farmers and sells that wheat in Canada and export markets including the United States. The Canadian Wheat Board was subject to antidumping and countervailing duty orders, *Certain Durum and Hard Red Spring Wheat From Canada*, 68 Fed. Reg. 52,747 (Dept. Commerce Sept. 5, 2003) (notice of final affirmative countervailing duty determinations); *Certain Durum and Hard Red Spring Wheat From Canada*, 68 Fed. Reg. 52,741 (Dept. Commerce Sept. 5, 2003) (notice of final determinations of antidumping duty investigations), until Commerce rescinded those orders effective as of January 2, 2006, *Antidumping Duty Investigation and Countervailing Duty Investigation of Hard Red Spring Wheat from Canada: Notice of Panel Decision, Revocation of Countervailing and Antidumping Duty Orders and Termination of Suspension of Liquidation*, 71 Fed. Reg. 8,275 (Dep't Commerce Feb. 16, 2005). On June 1, 2005, Customs published a notice of intent to make distributions of monies collected from the Canadian Wheat Board identifying a single eligible affected domestic producer: Defendant-Intervenor the North Dakota Wheat Commission. *See Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 70 Fed. Reg. 31,566, 32,132 (Dep't Customs June 1, 2005) (notice of intent to distribute offset for Fiscal Year 2005). Pursuant to the two orders on hard red spring wheat from Canada, the Commissioner distributed $ 127,643.68 to the North Dakota Wheat Commission ("NDWC") in November 2005, Def.'s Resp. Def. Int.'s Proposed Stmt. Facts at para. 59 (Jan. 30, 2006), and

currently holds cash deposits of $ 290,021.87 from unliquidated entries (as of October 1, 2005), Pl.'s Stip. Facts at 10.

E.

Plaintiffs filed their summonses and complaints in this action on April 29, 2005, claiming jurisdiction under 28 U.S.C. § 1581(i).[10] On July 12, 2005, the Defendant moved to dismiss each action pursuant to USCIT Rules 12(b)(1) and 12(b)(5), asserting that

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[10] 28 U.S.C. § 1581 (i) provides:

> In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a) - (h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1) - (3) of this subsection and subsections (a) - (h) of this section.
>
> This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court of International Trade under section 516A(a) of the Tariff Act of 1930 [19 U.S.C. § 1516a(a)] or by a binational panel under article 1904 of the North American Free Trade Agreement or the United States-Canada Free-Trade Agreement and section 516A(g) of the Tariff Act of 1930 [19 U.S.C. § 1516a(g)].

the court lacked subject matter jurisdiction and that the Plaintiffs had failed to state a claim for which relief could be granted because Plaintiffs' complaints were not authorized by domestic law. In a telephone conference held on August 2, 2005, Plaintiffs informed the court that they would oppose the Defendant's motion to dismiss for lack of subject matter jurisdiction with affidavits and would be filing motions for summary judgment pursuant to USCIT Rule 56 (more appropriately, motions for judgment on the agency record under Rule 56.1). Following the Supreme Court's suggestion in *Pennell v. San Jose*, 485 U.S. 1, 7, 108 S. Ct. 849, 99 L. Ed. 2d 1 (1988) ("We strongly suggest that in future cases parties litigating in this Court under circumstances similar to those here take pains to supplement the record in any manner necessary to enable us to address with as much precision as possible any question of standing that may be raised."); *Bennett v. Spear*, 520 U.S. 154, 167-68, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997) (outlining the evidentiary requirements of standing), the court, in light of the Plaintiffs' proposed filings, converted all pending motions into cross motions for summary judgment/motions for judgment on the agency record,[11] and pursuant to Rule 56(d), on March 27

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[11] The Defendant correctly notes that the merits of this case are solely determined on the basis of the administrative record. As such, the court has no fact-finding role with respect to the merits of the case at bar. Therefore, in this instance, a motion to dismiss brought under USCIT R. 12(b)(5) is effectively the same as a motion for judgment on the agency record brought under USCIT Rule 56.1. Accordingly, in the interests of a "just, speedy, and inexpensive," resolution of such cases, USCIT R. 1,

and March 28, 2006, held a hearing to resolve any disputed facts related to jurisdiction. The court also granted a motion by Plaintiffs to consolidate all of Plaintiffs' cases under Docket Number 05-324.

I. Overview

Defendant and Defendant-Intervenors allege numerous jurisdictional defects in the Plaintiffs' Complaints. Because jurisdictional bars to entertaining Plaintiffs' suits are a threshold inquiry, *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577-78, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89-102, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998), the court must find that jurisdiction exists before it may reach the merits. Nevertheless, because many of the jurisdictional arguments depend on at least a superficial understanding of the statutory scheme at issue, the court will here briefly discuss the text, purpose, and effect of Section 408 while leaving discussion of the *bona fide* disagreements over its interpretation to Section V below.

Plaintiffs, including Canada, raise their claims under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, to enforce Section 408 of the NAFTA Implementation Act as applied to Customs' administration of the Byrd Amendment. Plaintiffs ask the court to: (1) find unlawful Defendant's disbursements of monies collected on goods from Canada; (2) permanently enjoin future distributions; and (3) instruct Defendants to reclaim distributions

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the court prefers that parties move under USCIT Rule 56.1 for judgment on the agency record.

made on March 15, 2004 and December 17, 2004. *See, e.g.*, Gov't Canada Compl. 9, Can. Lum. Compl. 11-12.

It follows that, while Plaintiffs' causes of action are stated under the APA, the thrust of Plaintiffs' claims rest on Section 408. Section 408 provides that:

> Any amendment enacted after the Agreement enters into force with respect to the United States that is made to--
>
> (1) section 303 or title VII of the Tariff Act of 1930 [19 U.S.C. §§ 1671 *et seq.*], or any successor statute, or
>
> (2) any other statute which--
>
> (A) provides for judicial review of final determinations under such section, title, or successor statute, or
>
> (B) indicates the standard of review to be applied,
>
> shall apply to goods from a NAFTA country only to the extent specified in the amendment.

By requiring that amendments apply to goods from Canada and Mexico "only to the extent specified in the amendment," Congress, through Section 408, imposed a "magic words"[12] rule of interpretation on

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[12] A "magic words" rule, also referred to as a "magical password," "express-reference" or "express-statement" rule, is a strict clear statement rule which requires the use of certain words to signal a particular Congressional intent. *See, e.g.*, *Lockhart v. United States*, 126 S. Ct. 699, 703, 163 L. Ed. 2d 557 (2005); *cf. Demore v. Kim*, 538 U.S. 510, 517, 123 S. Ct. 1708, 155 L. Ed. 2d 724 (2003) (discussing *INS v. St. Cyr*, 533

amendments to U.S. trade laws, *i.e.*, that any amendment to title VII of the Tariff Act of 1930 must contain certain "magic words" for Congress to indicate that it intends to alter antidumping and countervailing duty laws with respect to NAFTA parties. SAA, reprinted in H.R. Doc. No. 103-159, p. 203 (1993) ("Section 408 of the bill implements the requirement of Article 1902 that amendments to the AD and CVD laws shall apply to a NAFTA country only if the amendment so states explicitly."). In so doing, Section 408 insulates NAFTA parties, including their exporters, from some changes to the antidumping and countervailing duty laws unless Congress has explicitly stated otherwise. Such an exercise of self-restraint was intended to ensure that future Congresses, agencies, and courts did not inadvertently abrogate the rights NAFTA parties negotiated, or, alternatively, to require future Congresses to give due consideration to the United States' NAFTA obligations before they amend the antidumping and countervailing duty laws. *See id.*; *cf. Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 125 S. Ct. 2169, 2182, 162 L. Ed. 2d 97 (2005) ("These clear statement rules ensure Congress does not, by broad or general language, legislate on a

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U.S. 289, 327, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001) (Scalia, J. concurring). Here, the required "magic words" are "shall apply to goods from Canada and Mexico." *Cf.* Section 234, Uruguay Round Agreements Act, 108 Stat. 4809, 4901 (1994) ("Pursuant to article 1902 of the North American Free Trade Agreement and section 408 of the North American Free Trade Agreement Implementation Act, the amendments made by this title shall apply with respect to goods from Canada and Mexico."). The court reserves discussion of the propriety of a "magic words" rule for Section V.b below.

sensitive topic inadvertently or without due deliberation."); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991) (applying a clear statement rule "to protect against unintended clashes between [U.S.] laws and those of other nations which could result in international discord" which Congress presumably seeks to avoid); *Lauritzen v. Larsen*, 345 U.S. 571, 582, 73 S. Ct. 921, 97 L. Ed. 1254 (1953) (applying the *Charming Betsy* canon, a clear statement canon, because, "in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided[.]"). Consequently, Plaintiffs claim, when the Byrd Amendment is read in conjunction with Section 408, the Byrd Amendment states that Customs shall distribute monies collected on duty orders except for duty orders on goods from Canada or Mexico.

With this overview in mind, the court will first consider the Defendant and Defendant-Intervenors' jurisdictional objections. Taken together, the Defendant and Defendant-Intervenors' assert that (1) the Plaintiffs lack the legal capacity to bring their complaints, *i.e.*, they lack standing (both under Article III and because of prudential limitations on standing); and (2) Plaintiffs' claims are barred by the political question doctrine.[13] Relatedly,[14] Defendant

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[13] All parties agree, as they must, that Congress' repeal of the Byrd Amendment does not moot this case. Not only are Plaintiffs seeking disgorgement of prior distributions which the repeal does not address, but also, because the repeal is not effective until October 1, 2007, *see* Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601(b), 120 Stat. 4, 154 (2006), injunctive relief may still be appropriate for monies collected until October 1, 2007.

and Defendant-Intervenors contend that Plaintiffs cause of action is barred by Section 102(c) of the NAFTA Implementation Act, codified at 19 U.S.C. § 3312(c). Because the court finds that it does have jurisdiction with respect to the Canadian Producers, and that they have a cause of action under U.S. law, it will then consider the merits.

II. STANDING

Article III of the United States Constitution provides that "the judicial Power shall extend to [certain] Cases . . . [and] Controversies . . . ." U.S. Const. art. III, § 2, cl. 1; cf. 28 U.S.C. § 251 (establishing the Court of International Trade as an Article III court). In accordance with this language, courts have required that every pending matter before an Article III Court be a "case" or "controversy." *See Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982). One of the cornerstones of this

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[14] "The question whether a federal statute creates a claim for relief is not jurisdictional." *Nw. Airlines, Inc. v. County of Kent*, 510 U.S. 355, 365, 114 S. Ct. 855, 127 L. Ed. 2d 183 (1994); *Air Courier Conf. v. Am. Postal Workers Union*, 498 U.S. 517, 523 n.3, 111 S. Ct. 913, 112 L. Ed. 2d 1125 (1991) (absence of a cause of action defense is waiveable because "whether a cause of action exists is not a question of jurisdiction."). *Cf. Steel Co.*, 523 U.S. at 89 ("the absence of a valid (as opposed to arguable) cause of action does not implicate [a court's] subject matter jurisdiction"); *Mathews v. Eldridge*, 424 U.S. 319, 330, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (finding that the "final agency action" requirement of the APA is waiveable). The court discusses whether Plaintiffs have a cause of action in Section IV below.

inquiry is whether the complaining parties have standing to raise their claims.

"In . . . pedestrian terms, [standing] is an answer to the very first question that is sometimes rudely asked when one person complains of another's actions: 'What's it to you?'" Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 882 (1983). Specifically as this question relates to challenges to administrative decision making, Plaintiffs must demonstrate that they have been, or likely will be, injured by Defendant's conduct, in a manner redressable by the court, and that the prudential considerations have been met. *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488, 118 S. Ct. 927, 140 L. Ed. 2d 1 (1998) ("NCUA"); *Dir. v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 126-27, 115 S. Ct. 1278, 131 L. Ed. 2d 160 (1995); *Ass'n of Data Processing Service Org., Inc. v. Camp*, 397 U.S. 150, 152-53, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970) ("*Data Processing*"). Each prong will be addressed in turn.

A. Article III Standing:

Article III standing requires plaintiffs to demonstrate: (1) that they have suffered some injury-in-fact; (2) a causal connection between the defendant's conduct and this injury-in-fact; and (3) that this injury is redressable by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) ("*Defenders of Wildlife*") (citations omitted). Although the prongs of the test are not always factually separable, each

prong must be satisfied. *See, e.g., Allen v. Wright*, 468 U.S. 737, 753 n.19, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984); *Wyo. Sawmills Inc. v. U.S. Forest Serv.*, 383 F.3d 1241, 1247-48 (10th Cir. 2004), *cert. denied* 126 S. Ct. 330, 163 L. Ed. 2d 43 (2005); *The Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315, 320 (4th Cir. 2002). Because the Canadian Producers' standing claim turns on a different analysis than that of the Government of Canada, the court will consider each claim separately.

i. Canadian Producers' Standing

a. The Injury-in-fact Requirement

Article III first requires Plaintiffs to demonstrate that they have suffered an injury-in-fact "which is (a) concrete and particularized, [and] (b) 'actual or imminent, not conjectural or hypothetical.'" *Defenders of Wildlife*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)). The injury-in-fact requirement aims not to shield defendants from litigation, but to ensure that the plaintiffs have a stake in the fight and will therefore diligently prosecute the case, *United Food & Commer. Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 556, 116 S. Ct. 1529, 134 L. Ed. 2d 758 (1996) (the standing requirement assures "adversarial vigor"); *Sierra Club v. Morton*, 405 U.S. 727, 740, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972), while, at the same time, ensuring that the claim is not abstract or conjectural so that resolution by the judiciary is both manageable and proper, *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 20, 118 S. Ct. 1777, 141 L. Ed. 2d 10 (1998); *Allen*, 468 U.S. at 752; *Los Angeles v.*

Lyons, 461 U.S. 95, 101, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983). Accordingly, while injury-in-fact must be found in every case regardless of the statutory provision at issue, *Defenders of Wildlife*, 504 U.S. at 577-78; *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 39, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976), it is nonetheless a "very generous" test, requiring only that claimants "allege[] some specific identifiable trifle of injury . . . ." *Bowman v. Wilson*, 672 F.2d 1145, 1151 (3rd Cir. 1982) (citing *United States v. SCRAP*, 412 U.S. 669, 689 n.14, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973) (rejecting the argument that plaintiffs' interests must be "significantly" affected, noting that only an "identifiable trifle" is sufficient)).

Applying these principles, courts "routinely recognize probable economic injury resulting from [governmental actions] that alter competitive conditions [are] sufficient to satisfy the [Article III 'injury-in-fact' requirement]." *Clinton v. City of New York*, 524 U.S. 417, 433, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998) (quoting III Kenneth Kulp Davis & Richard J. Pierce, *Administrative Law Treatise* 13-14 (3d ed. 1994)). Accordingly, courts have held that parties may "'suffer constitutional injury in fact when agencies . . . allow increased competition' against them." *U.S. Telecom Ass'n v. FCC*, 353 U.S. App. D.C. 59, 295 F.3d 1326, 1331 (D.C. Cir. 2002) (quoting *La. Energy & Power Auth. v. FERC*, 329 U.S. App. D.C. 401, 141 F.3d 364, 367 (D.C. Cir. 1998)).

In this case, there can be no doubt that the Plaintiffs are direct competitors with the recipients of Byrd Amendment distributions. *Cf. Sault Ste.*

Marie Tribe of Chippewa Indians v. United States, 288 F.3d 910, 916 (6th Cir. 2002) (denying standing because plaintiff failed to offer any evidence that a casino forty miles away would detract from its business); *Dek Energy Co. v. FERC*, 346 U.S. App. D.C. 6, 248 F.3d 1192, 1196 (D.C. Cir. 2001) (denying standing because of only a "vague probability" that competitor's product would "actually reach that market and a still lower probability that its arrival will cause [plaintiff] to lose business or drop its prices."); *Area Transp., Inc. v. Ettinger*, 219 F.3d 671, 673 (7th Cir. 2000) (where competitor was barred from the market, plaintiff lacked standing to seek disgorgement of subsidy). If it were not the case that the Canadian Producers and the domestic industries are direct competitors, it would be unlikely that the domestic producers would be entitled to obtain the protection of the underlying antidumping and countervailing duty orders that are the source of the Byrd Distributions. *See, e.g.*, 19 U.S.C. §§ 1671d(b)(1) & 1673d(b)(1) (requiring International Trade Commission to find material injury); 19 U.S.C. § 1675a(a) (same); 19 U.S.C. § 1677(9)(A) (defining interested parties to proceedings to include producers of the subject merchandise). Nor can it be seriously questioned that a direct payment to, *i.e.*, conferring of a subsidy on, a direct competitor may be sufficient to cause increased competition and therefore "a concrete and particularized injury" that is "actual or imminent." *See, e.g., W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 195 n.10 & 196 n.12, 114 S. Ct. 2205, 129 L. Ed. 2d 157 (1994);[15] *Bacchus*

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[15] The Supreme Court did not discuss standing in *W. Lynn Creamery*. Nevertheless, the Court did discuss at length the

injurious effect of subsidies, *see W. Lynn Creamery*, 512 U.S. at 195 n.10, and the Court has incorporated *W. Lynn Creamery*, and its analysis, into its standing jurisprudence. *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287, 117 S. Ct. 811, 136 L. Ed. 2d 761 (1997).

Both Defendant and Defendant-Intervenors rely on the *W. Lynn Creamery* Court's statement that "[a] pure subsidy funded out of general revenue imposes no burden on interstate commerce, but merely assists local business," to argue that the Byrd Distributions do not cause competitive injuries. *See, e.g.*, Def.'s Supp. Br. at 25 (quoting *W. Lynn Creamery*, 512 U.S. at 199). This reliance, however, is misplaced for two reasons. First, the scheme at issue here is not funded out of "general revenue sources" but from special accounts funded by duty orders on foreign competitors. Therefore, the Court's statement, under its own terms, cannot aid the Defendant and Defendant-Intervenors. *See id.* ("The pricing order in this case, however, is funded principally from taxes on the sale of milk produced in other states."). Secondly, this court agrees with Justice Scalia's assessment of this language when he stated in his concurrence:

> The Court guardedly asserts that a "pure subsidy funded out of general revenue *ordinarily* imposes no burden on interstate commerce, but merely assists local business," but under its analysis that must be taken to be true only because most local businesses (*e.g.*, the local hardware store) are not competing with businesses out of State.

W. Lynn Creamery, 512 U.S. at 208 (Scalia, J. concurring) (citation omitted) (emphasis in original). Here, this assumption does not hold as the recipients of Byrd Distributions are most assuredly "competing with businesses out of State." Consequently, the majority's discussion of how it is axiomatic that subsidies harm competitors, *e.g.*, *W. Lynn Creamery*, 512 U.S. at 195 n.10, is in no way negated by this statement.

Imps., Ltd. v. Dias, 468 U.S. 263, 267, 104 S. Ct. 3049, 82 L. Ed. 2d 200 (1984);[16] *United States Telecom Ass'n*, 295 F.3d at 1326; *Exxon Co., U.S.A. v. FERC*, 337 U.S. App. D.C. 119, 182 F.3d 30, 43 (D.C. Cir. 1999); *Adams v. Watson*, 10 F.3d 915, 920-21 (1st Cir. 1993); *Westport Taxi Serv., Inc. v. Adams*, 571 F.2d 697, 700-01 (2d Cir. 1978); *Rental Hous. Ass'n of Greater Lynn, Inc. v. Hills*, 548 F.2d 388, 389-90 (1st Cir. 1977); *Ray Baillie Trash Hauling, Inc. v. Kleppe*, 477 F.2d 696, 701 (5th Cir. 1973). *Cf. Area Transp., Inc. v. Ettinger*, 219 F.3d at 673. Indeed, it must be the case that subsidies to competitors confer standing under our trade laws -- if parties did not suffer an injury-in-fact from an agency's failure to countermand such a subsidy, then no member of the domestic industry would have standing to challenge a *negative* determination by the Department of Commerce or International Trade Commission in an antidumping and countervailing duty case, *see Shieldalloy Metallurgical Corp. v. United States*, 20 CIT 1362, 1374, 947 F. Supp. 525, 536 (1996) ("As a direct competitor of Shieldalloy, Galt would suffer injury in fact if Commerce were to

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[16] *Bacchus* involved a challenge to a tax exemption which is similar to, and results in similar ends, as a subsidy. *See Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983); *cf. Camps v. Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 588-594, 117 S. Ct. 1590, 137 L. Ed. 2d 852 (1997) (although factually similar, tax exemptions are permitted under the Establishment Clause whereas subsidies are not); *W. Lynn Creamery*, 512 U.S. at 207-12 (Scalia, J. concurring) (noting that although they achieve the same result, it appears that subsidies are permissible under the Dormant Commerce Clause whereas tax exemptions are not).

calculate Shieldalloy's dumping margin based on distorted or impermissible data."), or (perhaps), even intervene in such cases before this Court, *Diamond v. Charles*, 476 U.S. 54, 68-69, 106 S. Ct. 1697, 90 L. Ed. 2d 48 (1986) (leaving open whether intervenors must have standing).[17]

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[17] The Defendant also tries to distinguish *Shieldalloy Metallurgical Corp.*, 20 CIT 1362, 947 F. Supp. 525 (1996), asserting that, in that case, the statute provided standing. This argument fails to recognize that injury-in-fact is an indispensable constitutional minimum. No act of Congress may displace this requirement. *Defenders of Wildlife*, 504 U.S. at 560; *Muskrat v. United States*, 219 U.S. 346, 362, 31 S. Ct. 250, 55 L. Ed. 246, 46 Ct. Cl. 656 (1911). Therefore, the Article III injury does not turn on whether Congress has granted parties a cause of action. *See Defenders of Wildlife*, 504 U.S. at 576 ("There is absolutely no basis for making the Article III inquiry turn on the source of the asserted right."); *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 497 (7th Cir. 2005); compare *Clinton*, 524 U.S. at 433-34 n.22 *with id.* at 456 (Scalia J. dissenting); *cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 n.5, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) ("Also contrary to JUSTICE STEVENS' unprecedented suggestion . . . redressability -- like the other prongs of the standing inquiry -- does not depend on the defendant's status as a governmental entity." (citation omitted)). The court further notes that whatever minimum evidentiary requirement applies here must apply to all cases; this requirement is blind to whether the plaintiff is a member of the domestic industry appealing a negative determination or an importer appealing an affirmative determination. Furthermore, standing is a matter this court must determine *de novo*, *Fieldturf Inc. v. Sw. Recreational Indus., Inc.*, 357 F.3d 1266, 1268 (Fed. Cir. 2004); therefore, whatever standard the court applies here, it must apply in every case nothwithstanding a finding of material injury by the International Trade Commission. *See generally Steel Co.*, 523 U.S. at 94 (the question of standing is one the court is "bound to ask and answer for itself" (quoting *Great S. Fire Proof Hotel*

Nevertheless, both Defendant and Defendant-Intervenors argue that the Canadian Producers do not have standing to maintain their challenge because: (a) the Complaints did not sufficiently plead standing; (b) economic injury is an insufficient basis to confer standing; and (c) Plaintiffs have suffered no

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Co. v. Jones, 177 U.S. 449, 453, 20 S. Ct. 690, 44 L. Ed. 842 (1900)); *cf. United Transp. Union v. ICC*, 282 U.S. App. D.C. 38, 891 F.2d 908, 916 (D.C. Cir. 1989) (while the court may consider Congressional findings, it must ultimately conclude for itself that standing exists). Certainly, many injury determinations by the International Trade Commission are not based on the type of specific injuries that the Defendants would have us require.

Even after oral argument, the Defendant continues to press its attempt to distinguish *Shieldalloy*. Citing *Warth v. Seldin*, 422 U.S. 490, 514, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975) ("Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where plaintiff would have suffered no judicially cognizable injury in the absence of statute."), the Defendant argues that because "an aggrieved petitioner for an antidumping or countervailing duty order may challenge a final negative injury determination by the International Trade Commission ("ITC") contending that it is 'unsupported by substantial evidence on the record, or otherwise not in accordance with law,' 19 U.S.C. § 1516a," Congress has created a statutory right of the type contemplated by *Warth*, "(*i.e.*, by enacting the antidumping and countervailing duty statutes, Congress has made 'legally cognizable,' a petitioner's claim)." Def.'s Post-Hearing Supp. Br. at 3.

This argument, however, ignores the requirements of *Defenders of Wildlife* that constitutional standing be met in every case; in addition, it inappropriately conflates the analysis of a plaintiff's cause of action with the analysis of standing. *See infra* at pp. 43-44.

injury-in-fact as a matter of fact. Each objection will be addressed in turn.

1) Sufficiency of the Complaints

In their Complaints, the Canadian Producers allege that they are exporters in "direct competition" with recipients of Byrd Distributions, and that they "have suffered, and will continue to suffer harm to their economic and competitive interests as a result of the distribution of funds pursuant to [the Byrd Amendment]." Can. Lum. Compl. 4. *See also* Norsk Compl. 4 (same); Ontario Forest Indus. Compl. 3; CWB Compl. 3 (alleging that it "will suffer harm to its economic interests"). The Defendant, citing the Federal Circuit's decision in *McKinney v. U.S. Dep't of Treasury*, 799 F.2d 1544, 1555 (Fed. Cir. 1986), avers that the Canadian Producers alleged no "specific injury whatsoever" in their complaints. Def.'s Mem. Supp. Def.'s Mot. Dismiss at 16 ("Def.'s Mem."). *See also* Def.'s Combined Reply Supp. Mot. Dismiss & Opp. Pl.'s Mot. Summ. J. at 25-26 ("Def.'s Reply").[18]

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[18] Defendant's argument also overlooks the fact that a court, in considering a motion to dismiss under 12(b)(1), may look at materials outside the complaint. Def.'s Reply at 9 (quoting *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1584 (Fed. Cir. 1993)). In other words, the court need not limit itself to the four corners of the complaint, but may consider affidavits, reports by the International Trade Commission, Congressional Research Service, factual assessments by the WTO, or the statute itself, *see* Section II(1) (C) below. Moreover, (and as Defendant-Intervenors appear to concede with regard to cases in which standing is uncontested) the Supreme Court has required very little evidence in finding economic injuries cognizable. *See, e.g., Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 395, 107 S. Ct. 750, 93 L. Ed. 2d 757 (1987); *Bacchus Imp.*,

Although Defendant's argument may be supported by language in *McKinney*, in the years since that decision, the Supreme Court has clarified pleading requirements for standing. *See, e.g.*, *Bennett v. Spear*, 520 U.S. 154, 167-68, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990) ("*Nat'l Wildlife Fed'n*"). According to the Supreme Court's current articulation of the pleading requirements, "each element of Article III standing 'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.'" *Bennett*, 520 U.S. at 167-68 (quoting *Defenders of Wildlife*, 504 U.S. at 561). Because Plaintiffs' Complaint need only "set forth . . . a short and plain statement of the grounds upon which the court's jurisdiction depends," USCIT R. 8, "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.'" *Defenders of Wildlife*, 504 U.S. at 561 (quoting *Nat'l Wildlife Fed'n*, 497 U.S. at 889). Consequently, a district court may only dismiss a complaint if it can presume no "specific facts under

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Ltd., 468 U.S. at 267 (the regulation "increased the price of [plaintiffs'] products as compared to the exempted beverages, and the wholesalers are surely entitled to litigate whether the discriminatory tax has had an adverse competitive impact on their business."); *Bryant v. Yellen*, 447 U.S. 352, 367, 100 S. Ct. 2232, 65 L. Ed. 2d 184 (1980).

which the petitioners will be injured." *Bennett*, 520 U.S. at 168; *see also Baur v. Veneman*, 352 F.3d 625, 631 (2d Cir. 2003); *Alliant Energy Corp. v. Bie*, 277 F.3d 916, 920 (7th Cir. 2002) (Easterbrook, J.) ("supplying details is not the function of a complaint. It is easy to imagine facts *consistent with* this complaint and affidavits that will show plaintiffs' standing, and no more is required." (emphasis in original)); *S. Austin Coal. Cmty. Council v. SBC Commc'ns., Inc.*, 274 F.3d 1168, 1171 (7th Cir. 2001) ("Complaints need not be elaborate, and in this respect injury (and thus standing) is no different from any other matter that may be alleged generally."); *S. Christian Leadership Conf. v. Supreme Court of La.*, 252 F.3d 781, 788 (5th Cir. 2001) (noting the "expansive and deferential way in which [courts] construe pleadings" with respect to injury).[19]

Applying the rule stated in *Defenders of Wildlife*, in this case, the court cannot fail to presume the specific facts necessary to satisfy standing here because such consequences are implicit in the statutory scheme itself. Here, it is apparent that the Plaintiffs' sales may be diverted to a competitor that is better able to compete as a result of the Byrd Amendment distributions. *See, e.g., W. Lynn Creamery, Inc.*, 512 U.S. at 195 n.10 & 196 n.12; *Data Processing*, 397 U.S. at 152 (proving injury by reference to customers who had switched to competitors); *Inv. Co. Inst. v. Camp*, 401 U.S. 617,

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[19] Neither Defendant nor Defendant-Intervenors offered an explanation as to why the Complaints did not meet this standard.

620, 91 S. Ct. 1091, 28 L. Ed. 2d 367 (1971); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 476-77, 60 S. Ct. 693, 84 L. Ed. 869 (1940) (granting license to competitor sufficient to satisfy injury-in-fact); *Leaf Tobacco Exp. Ass'n v. Block*, 749 F.2d 1106, 1112 (4th Cir. 1984); *Ray Baillie*, 477 F.2d at 701 (Government contract scheme "enabled [plaintiff's competitor] to receive a premium price above that which would have prevailed under competitive bidding and that [its competitor has] since used this premium to submit low bids for private commercial contracts, thus causing the plaintiffs to lose some of their customers to [its competitor]."). *See also C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 430, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994) (Souter, J. dissenting) ("a subsidized competitor can effectively squelch competition by underbidding it."); *United States v. Butler*, 297 U.S. 1, 71, 56 S. Ct. 312, 80 L. Ed. 477, 1936-1 C.B. 421 (1936) ("If the cotton grower elects not to accept the [subsidy], he will receive less for his crops; those who receive payments will be able to undersell him."). Relatedly, Plaintiffs' comparative advantage may be undermined thereby reducing the price they may charge (and therefore reducing their profit margins). *See, e.g., Sugar Cane Growers Coop. of Fla. v. Veneman*, 351 U.S. App. D.C. 214, 289 F.3d 89, 94 (D.C. Cir. 2002); *Minn. Milk Producers Ass'n v. Madigan*, 956 F.2d 816, 817-19 (8th Cir. 1992) (agency action which causes supply to increase created injury); *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 506 (9th Cir. 1988) (injury caused by a tax which upset comparative advantage); *Panhandle Producers & Royalty Owners Ass'n v. Econ. Regulatory Admin.*, 262 U.S. App. D.C. 43, 822 F.2d

1105, 1108-09 (D.C. Cir. 1987) ("Under undisputed economic principles, such an increase in supply is likely to depress the prices that petitioner's members can secure."); *Tax Analysts & Advocates v. Blumenthal*, 184 U.S. App. D.C. 238, 566 F.2d 130, 137-38 (D.C. Cir. 1977) (same); *cf. Bryant*, 447 U.S. at 367 (government program that made possible the sale of excess lands at below market price sufficient to confer standing on potential purchasers interested in maintaining program). The increase (or sustaining) of competition may cause Plaintiffs' costs to grow to counter this competition, again reducing their profit margin. *See, e.g., Nat'l Park Hospitality Ass'n v. DOI*, 538 U.S. 803, 819, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003) (Breyer, J. dissenting); *DIRECTV, Inc. v. FCC*, 324 U.S. App. D.C. 72, 110 F.3d 816, 830 (D.C. Cir. 1997) (injury caused by divesture requirement in bidding process); *cf. Clinton*, 524 U.S. at 432 (denial of benefit during bargaining process sufficient to confer standing). The competitiveness of the market may make Plaintiffs' business ventures less attractive to potential investors, reducing the Plaintiffs' ability to raise capital or sell their business interests. *See, e.g., Alliant Energy Corp.*, 277 F.3d at 920 ("Higher costs of capital injure the firm, making [plaintiffs] the right plaintiffs."); *Mount Wilson FM Broadcasters, Inc. v. FCC*, 280 U.S. App. D.C. 252, 884 F.2d 1462, 1465 (D.C. Cir. 1987) (approving this theory); *Tax Analysts*, 566 F.2d at 136-37; *cf. McKinney*, 799 F.2d at 1555.

Because economic logic suggests that Plaintiffs have been injured, and because Defendant-Intervenors are the only parties who would have any

evidence as to how the distributions have been, and will be, used and, therefore, whether they have enhanced affected domestic producers' abilities to compete, requiring anything further in the way of allegations at the pleading stage would convert pleading requirements into a formidable barrier - a result at odds with the liberal notice pleading requirements underlying USCIT R. 8. *See, e.g., United Transp. Union*, 891 F.2d at 912 n.7 ("Allegations founded on economic principles such as . . . in competitor standing cases, while perhaps not as reliable as allegations based on the laws of physics, are at least more akin to demonstrable facts than are predictions based only on speculation."); *Alliance for Clean Coal v. Miller*, 44 F.3d 591, 593-94 (7th Cir. 1995); *cf. Sugar Cane Growers*, 289 F.3d at 94 (it was the Government's burden if it wanted to contest Plaintiff's economic theory of injury to request a hearing); *Alliant Energy Corp.*, 277 F.3d at 916 (plaintiff does not have to negate defenses in its complaint); *Adams*, 10 F.3d at 925 (defendants can refute economic theory at summary judgment or an evidentiary hearing). This principle is especially true here given that subsidies are known for their lack of transparency. *See* Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. Chi. L. Rev. 1, 30-31 (1999); cf. Testimony of Dr. David John Teece, Trial Transcript of March 28, 2006 Hearing at 282.

Accordingly, following clear Supreme Court precedent, Defendant's argument to dismiss on this basis must be rejected.

2) Whether competitive injuries are cognizable

Defendant and Defendant-Intervenors contend that economic injuries are not cognizable within the meaning of the injury-in-fact test. *See, e.g.*, Def.'s Reply at 22-24; Def.'s Mem. at 14, 17; Def.-Int.'s Reply Mot. Supp. Def.-Int.'s Mot. Summ. J. & Resp. Opp. Pl.'s Cross-Mot. Summ. J. at 30-32 ("Def.-Int.'s Reply"). Specifically, relying on the Supreme Court's statement in *Hardin v. Ky. Utils. Co.*, 390 U.S. 1, 5-6, 88 S. Ct. 651, 19 L. Ed. 2d 787 (1968) that "this Court has, it is true, repeatedly held that the economic injury which results from lawful competition cannot, in and of itself, confer standing on the injured business to question the legality of any aspect of its competitor's operations," and the proposition that there is no constitutional right to import, see, *e.g.*, *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 318, 53 S. Ct. 350, 77 L. Ed. 796, Treas. Dec. 46331 (1933); *Bd. of Trustees of the Univ. of Ill. v. United States*, 289 U.S. 48, 58, 53 S. Ct. 509, 77 L. Ed. 1025, Treas. Dec. 46306 (1933), Defendant and Defendant-Intervenors argue that Plaintiffs have suffered no injury. The court disagrees.

First, Defendant and Defendant-Intervenors' reliance on this authority is unfounded. Although they correctly quote one line of *Hardin*, the very next lines of that decision read:

> But competitive injury provided no basis for standing in the above cases simply because the statutory and constitutional requirements that the plaintiff sought to enforce were in no way concerned with protecting against

> competitive injury. In contrast, it has been the rule, at least since the *Chicago Junction Case*, 264 U.S. 258, 44 S. Ct. 317, 68 L. Ed. 667 (1924), that when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision.

Hardin, 390 U.S. at 6 (emphasis added).[20] The *Hardin* Court then went on to find standing because

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[20] The Defendant claims that *Hardin* has been cited approvingly by the Supreme Court. It matters, however, *how Hardin* was being cited. Most recently, Justice O'Connor cited *Hardin* in her *dissent* in *NCUA* to contrast a case where the statute concerned competition, *i.e.*, *Hardin*, from plaintiffs' case in *NCUA*. *NCUA*, 522 U.S. at 518 (O'Connor, J. dissenting). Justice O'Connor also made this argument in relation to the *zone of interest test*, discussed *infra* at 63-69, not the injury-in-fact test. In *Defenders of Wildlife*, 504 U.S. at 578, the Court noted that cases decided around the time of, and including, *Hardin* "involved Congress' elevating to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law (namely, injury to an individual's personal interest in living in a racially integrated community, *see Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 208-212, 93 S. Ct. 364, 34 L. Ed. 2d 415 (1972), and injury to a company's interest in marketing its product free from competition, *see Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 6, 88 S. Ct. 651, 19 L. Ed. 2d 787 (1968))." In other words, *Defenders of Wildlife* recognized that Hardin stood for the proposition that economic injuries were cognizable and that the line of analysis upon which Defendant relies is out of vogue. These later cases, just like the court here, do not read *Hardin* to preclude Plaintiffs' standing but to support it. *See also Bradford Sch. Bus Transit, Inc. v. Chi. Transit Auth.*, 537 F.2d 943, 946 (7th Cir. 1976); *Scanwell Labs, Inc. v. Shaffer*, 137 U.S. App. D.C. 371, 424 F.2d 859, 865 (D.C. Cir. 1970).

of competitive injuries. *Id.* Neither Defendant, nor Defendant-Intervenors, mention this second and third sentence, or the Court's holding.

Defendant-Intervenors attempt to buttress their argument by quoting *Arnold Tours, Inc. v. Camp*, 408 F.2d 1147, 1149 (1st Cir. 1969) ("because of the policy encouraging free and open competition - a policy that favors competition in the market place, not in the courts."), claiming that this decision was "reversed on other grounds" by *Arnold Tours, Inc. v. Camp*, 397 U.S. 315, 90 S. Ct. 1109, 25 L. Ed. 2d 333 (1969).[21] Def.-Int.'s Reply at 30. The First Circuit's decision in *Arnold Tours*, however, was not "reversed on other grounds," it was *vacated*, *Arnold Tours*, 397 U.S. at 315, and therefore may not be cited. Moreover, as the Supreme Court recounted the following year when it again took up the case: "Following our decisions last Term . . . we vacated and remanded the case for reconsideration . . . and the Court of Appeals reaffirmed its previous decision." *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 46, 91 S. Ct. 158, 27 L. Ed. 2d 179 (1970). In this

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[21] Similarly, Defendant repeatedly relies on *Kan. City Power & Light Co. v. McKay*, 96 U.S. App. D.C. 273, 225 F.2d 924, 928 (D.C. Cir. 1955) for the proposition that where plaintiffs "have not been subjected to any obligation or duty . . . decisions of the Supreme Court . . . establish that an interest of this kind is not sufficient to enable them to sue to enjoin execution of . . . [a] program of the Government." *See, e.g.*, Def.'s Supp. Br. at 15; Def.'s Reply at 21. This, however, is a statement of the legal rights test, and has been rejected by the Supreme Court. *See Sierra Club v. Morton*, 405 U.S. 727, 733, 92 S. Ct. 1361, 31 L. Ed. 2d 636 & n.4 (1972); *see also Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 39, 96 S. Ct. 1917, 48 L. Ed. 2d 450 & n.18 (1976).

latter decision, the Court *reversed* the First Circuit and found standing. *Id.* In other words, the case upon which the Defendant-Intervenors rely was not "reversed on other grounds" it was vacated and then, when the Supreme Court granted certiorari again, reversed on those grounds. *See, e.g.*, Def.-Int.'s Reply at 32 n.25 (properly noting this subsequent history in light of the District Court's decision in *Arnold Tours*). From this authority, and others, the First Circuit agreed eight years later that there exists "no authority for the proposition that competitive harm is an insufficient allegation of injury in fact. Quite the contrary, the cases finding allegations of competitive injury sufficient are legion." *Rental Housing Ass'n v. Hills*, 548 F.2d 388, 389 (1st Cir. 1977).

Furthermore, Plaintiffs' claims do not rest on a constitutional right to import but on a statutory right not to have the antidumping and countervailing duties laws amended to disadvantage their access to U.S. markets (without Congress explicitly including them within the amendment); *cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982) (canvassing extensive authority on this distinction in finding that statutes providing substantial evidence review create due process interests); *Warth v. Seldin*, 422 U.S. 490, 500, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975) ("The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . . .') (quoting *Linda R. S. v. Richard D.*, 410 U.S. 614, 617, n.3, 93 S. Ct. 1146, 35 L. Ed. 2d 536 (1973)), rendering any argument that Plaintiffs have no

constitutional right of no relevance. This does not mean that when Congress does create a legal right, plaintiffs do not have to demonstrate standing. To the contrary, the "'[statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.'" *Defenders of Wildlife*, 504 U.S. at 578 (quoting *Sierra Club*, 405 U.S. at 738). As such, although injuries to interests that are not constitutionally protected are sufficient, "injury amounting only to the alleged violation of a right to have the Government act in accordance with law [is] not judicially cognizable." *Id.* at 575.

Perhaps even more importantly, Defendant's argument rests on a standing analysis that has long been rejected by the Supreme Court. In *Data Processing*, the Supreme Court rejected the "legal interest" analysis which required claimants to demonstrate an injury to their legally protected rights. *See, e.g., Akins*, 524 U.S. at 19; *Barlow v. Collins*, 397 U.S. 159, 164, 90 S. Ct. 832, 25 L. Ed. 2d 192 (1970); *Panhandle Producers*, 822 F.2d at 1108-09 (noting that although counterintuitive, "competitors have a seemingly unbroken record of success in securing standing to challenge decisions involving agency licensing."). In repudiating that earlier test, the Court noted that the "'legal interest' test [went] to the merits [whereas the] question of standing is different," *Data Processing*, 397 U.S. at 153, and that the legal interest test conflicted with the "broadly remedial purpose" of the APA, *id.* at 156. The Supreme Court's rejection of the "legal interest" analysis was absolute and unqualified. *See*

Jonathan R. Siegel, *Zone of Interests*, 92 Geo. L. J. 317, 320 (2004) ("*Data Processing* rejected the 'legal right' test and created the now-familiar rule that Article III of the Constitution permits a plaintiff to bring suit in federal court provided the plaintiff is 'injured in fact,' without regard to whether the plaintiff has a legal right to be free from injury."); Sanford A. Church, *A Defense of the "Zone of Interests" Standing Test*, 1983 Duke L.J. 447, 449-52 (1983) ("Before 1968, courts used a 'legal interest' test to decide the standing of a party challenging agency action . . . The [*Data Processing* Court] replaced the legal interest test with the zone of interests test."); David P. Currie, *Misunderstanding Standing*, 1981 Sup. Ct. Rev. 41, 42 ("The *Data Processing* case in 1969, rejected the 'legal right' test, [and] declared in apparently general" terms that the zone of interest analysis would apply to future cases); Kenneth Culp Davis, *The Liberalized Law of Standing*, 37 U. Chi. L. Rev. 450, 453 (1970) ("A huge portion of the former foundation of the law of standing was thus knocked out. The old test of 'a recognized legal interest' was specifically rejected."). Any remnants of this analysis are now relevant only to prudential considerations in the context of the zone of interest test discussed below. *Air Courier Conference*, 498 U.S. at 524.

Defendant-Intervenors address the fact that D*ata Processing* and its progeny rejected the legal interest analysis asserting that these cases are not controlling because they dealt only with *new competitors*, whereas plaintiffs' claim alleges unlawful competition from *existing competitors*. Def.-Int.'s Reply at 31. This distinction, however, is

unpersuasive. *Data Processing* rejected the legal interest analysis in definitive terms, not only relating to *new competitors*. Moreover, the distinction Defendant-Intervenors attempt to draw fails to recognize that the Plaintiffs are alleging *new competitive* threats as a result of Byrd Amendment distributions. *Cf. Alliance for Clean Coal*, 44 F.3d at 593-94; *Adams*, 10 F.3d at 919; *Nat'l Coal Ass'n v. Hodel*, 263 U.S. App. D.C. 386, 825 F.2d 523, 526 (D.C. Cir. 1987). This attempted distinction is also belied by the fact that parties regularly bring suit against existing competitors in antitrust, copyright, and *trade* cases. Accordingly, this distinction is of no moment.

3) Lack of injury-in-fact

Last, Defendant and Defendant-Intervenors assert that the Byrd Amendment has not so altered the competitive conditions for the Canadian Producers as to cause an injury-in-fact. As noted above, the court held a two day hearing to resolve this factual dispute. At that hearing, the court took testimony from Mr. Neal Fisher, Administrator for the North Dakota Wheat Commission, Mr. Mike Legge, President of U.S. Magnesium, Professor Janusz Alexander Ordover, Professor of Economics at New York University and Professor David John Teece, Professor of Business Administration at the Walter A. Haas School of Business at the University of California Berkeley.

At the outset on this issue, the Canadian Producers contend that the Byrd Distributions enhance the ability of affected domestic producers to compete; this alteration of the competitive

environment, the Canadian Producers claim, will invariably lead to competitive injuries. More specifically, the Canadian Producers maintain, supported by the expert testimony of Dr. Ordover, that the Byrd Amendment leads to two types of harm:

> (1) *"Ex Ante" Harms*: The Canadian Producers claim that the Byrd Amendment encourages affected domestic producers to invest in qualifying expenditures that they would not have made but for the Byrd Amendment. Under this theory, because each prospective recipient's share of the money available for distribution is determined by its claimed qualifying expenditures, affected domestic producers have an incentive to expend resources on qualifying expenditures to increase their share of the funds available. To use a simplified example, consider the investment choice of a firm purchasing new equipment. If a firm considers purchasing equipment that will, absent the Byrd Amendment, return ninety-nine cents for every dollar invested, the firm will not invest in the new equipment as its projected investment yields a negative return. However, with the Byrd Amendment, if the expected Byrd Distribution for this qualifying expenditure is more than one cent per dollar invested, the expected value of purchasing that equipment becomes positive, leading the firm to buy the new equipment. The purchase of new equipment may lead to higher production, or lower marginal costs, which

will adversely affect the firm's market competitors. Accordingly, under this claim, even without Customs actually distributing money, the mere prospect of Byrd Distributions will lead to competitive investments.[22]

(2) *"Ex Post" Harms*: This claim is that once the Byrd Distributions are made, domestic industries can use those funds to enhance their productivity or weather turbulent economic markets. Because the Byrd Distributions come with no strings attached, firms will make efficient business choices. Nevertheless, the Byrd Distributions allow firms access to "free money." This not only may lower their costs of capital, but also, lead them to make more investments than those that their creditors otherwise would have sponsored. For example, if there is a downturn in the market for a given product (say because of an oversupply of a commodity within a market), affected domestic producers may turn to cash reserves cumulated through

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[22] Plaintiffs concede that, because the North Dakota Wheat Commission and U.S. Magnesium are the only eligible affected domestic producers, this incentive structure will not apply to them. This concession may have been made in haste. If a company is choosing between closing down operations or staying in business, the prospect of future distributions may tilt the balance in favor of staying in the market. For example, if a company is projected to lose $10 dollars in the next fiscal year, it may decide to close its operations. However, if the expected value of the Byrd Distributions is $10.01 dollars, it may stay in business an additional year to receive that pay off.

Byrd Distributions to out-wait their competitors - a choice their creditors may not have approved.

Both theories are supported by either government studies or economic principles adopted by courts. *See infra* at note 44.

Defendant introduced expert testimony attempting to rebut these hypotheses. In response to the "*ex ante*" analysis, Defendant's expert, Dr. Teece, argued that there is a large measure of uncertainty with regard to future Byrd Distributions. Specifically, because the money Customs holds on unliquidated entries may never be transferred from the "clearing accounts," *i.e.*, the escrow-like accounts Customs creates for cash deposits, to "special accounts," *i.e.*, the accounts from which distributions are then made (from the duties collected on liquidated entries), Dr. Teese opined that firms are not presently considering future allocations in their investment calculus; moreover, Dr. Teece argued, in terms of the Lumber Plaintiffs in particular because there are so many affected domestic producers vying for Byrd Distributions, each company's share will be very small thereby dissipating any incentive to invest in qualifying expenditures.

Dr. Teece also argued that the Canadian Producers' "*ex post*" analysis fails. Contrasting production subsidies, *i.e.*, subsidies for which the terms or conditions of receipt are directly or indirectly tied to productive enterprises, with pure subsidies, *i.e.*, lump sum cash grants that may be dedicated to any purpose ("manna from heaven"), Dr.

Teece opined that the Byrd Distributions are pure subsidies and can be used for any purpose. As such, firms may use this money to diversify their investments into other markets, increase dividends, shut down their operations, or maintain larger cash reserves for use at some distant date in the future. In essence, Dr. Teece maintained, there are too many alternative ways affected domestic producers may spend their distributions to warrant any conclusion that those expenditures will have any adverse affect on the Canadian Producers.[23]

As stated above, in weighing these competing claims, the court must consider whether plaintiffs have demonstrated that their claimed injuries are probable and imminent as opposed to speculative or

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[23] The Defendant and Defendant-Intervenors have also marshalled evidence showing that the Canadian Producers' market shares have not declined since Byrd Distributions started. This fact, however, is not relevant to the injury-in-fact inquiry. *Pennell v. San Jose*, 485 U.S. 1, 8, 108 S. Ct. 849, 99 L. Ed. 2d 1 (1988) ("The likelihood of enforcement, with the concomitant probability that a landlord's rent will be reduced below what he or she would otherwise be able to obtain in the absence of the Ordinance, is a sufficient threat of actual injury to satisfy Art. III's requirement . . . ."); *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 345, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977) ("In the event the North Carolina statute results in a contraction of the market for Washington apples or prevents any market expansion that might otherwise occur, it could reduce the amount of the assessments due the Commission and used to support its activities."); *Lac Du Flambeau Band of Lake Superior Chippewa Indians*, 422 F.3d 490, 498 (7th Cir. 2005); *Alliance for Clean Coal*, 44 F.3d at 595 ("The alleged injury stems from the fact that sales have not increased as much or as rapidly as they would have on a level playing field without the Coal Act.").

conjectural.[24] *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 430, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998); *Defenders of Wildlife*, 504 U.S. at 561; *cf. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, Inc., 528 U.S. 167, 184, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (noting that there was nothing "improbable" about plaintiffs' alleged harm). Moreover, the injury need not be great, an identifiable trifle is sufficient, *i.e.*, there is no defense that a harm is *de minimus*. *See United States v. SCRAP*, 412 U.S. 669, 689 n.14, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973); *see also Akins*, 524 U.S. at 21 (finding that deprivation of information constitutes an injury because "there is no reason to doubt their claim that the information would help them"); *accord Laidlaw Envtl. Servs.*, 528 U.S. at 186. Moreover, although a party invoking the court's jurisdiction has the burden of proving that jurisdiction is proper, *see, e.g., Defenders of Wildlife*, 504 U.S. at 561, that party does not have to "negate . . . speculative and hypothetical possibilities . . . in order to demonstrate the likely effectiveness of judicial relief," *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 78, 98 S. Ct. 2620, 57 L. Ed. 2d 595 (1978). The court further notes its agreement with Dr. Teece's assessment that because money is "completely fungible," tracing where Bryd distributions are used

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[24] Imminency is satisfied here because the Byrd Distributions are ongoing, *i.e.*, the putatively illegal governmental action being protested is occurring now. If the court required the parties to wait until their competitors actually used the money, given the two year statute of limitations for bringing claims under 28 U.S.C. § 1581(i), requiring plaintiffs to wait until they were actually injured would deprive them of any relief.

is a difficult, if not impossible, assignment. Testimony of Dr. Teece, Trial Transcript of March 28, 2006 Hearing at 282. Therefore, the court must consider whether, on the record here, it is likely that any of the past distributions have been, and/or likely will be, used to Plaintiff Producers' detriment.

Bearing these observations in mind, the court is persuaded by the Canadian Producers' arguments that there will likely be some injury as a result of the distributions. As this inquiry relates to Lumber Plaintiffs, Dr. Teece did not dispute that affected domestic producers may use a portion of their distributions to enhance their competitive positions. His testimony was simply that the uncertainty was too great to warrant any definitive conclusion that affected domestic producers would use any of their distributions to enhance their competitive positions. However, the fact remains that the very United States Government Accountability Office study that figured into his analysis noted that at least one firm (if not more) has used its distributions on expenditures that would likely enhance its competitive position. United States Government Accountability Office, *Report to Congressional Requesters: International Trade: Issues and Effects of Implementing the Continued Dumping and Subsidy Offset Act*, 104 (2005) ("GAO Report") (noting from survey results that lumber firms used distributions to "pay debt, past qualifying expenditures, general operating expenditures, general corporate expenses, and capital investment." (emphasis added)). Similarly, although twelve out of the thirteen

recipient firms had noticed "little or no effects"[25] of the Byrd Distributions, one firm did note "positive effects." *Id.* at 102. Nor is the court convinced that future distributions will not be used in a similar fashion. Indeed, according to one group representing the domestic lumber industry, the Byrd Amendment "provides a direct cash influx for those who have been and continue to be most harmed by unfair trade, allowing such entities crucial time and capital to adapt to the unfair trade practices and maintain employment levels." Coalition for Fair Lumber Imports, *The American Lumber Industry: Enforcement of the Trade Laws Essential to the Industry*, Pl.'s Ex. 32 at 37 (2005). Such investments may occur even in periods of time where there is an "oversupply" of the commodity. Testimony of Dr. David John Teece, Trial Transcript of March 28, 2006 Hearing at 292. As such, it is implausible for the government to maintain that none of the money has been, or will be, used to alter the competitive landscape. This is certainly more than the identifiable trifle necessary to sustain standing for the Lumber Plaintiffs.

More problematic are the claims of the Canadian Wheat Board and Norsk. Neither industry is directly discussed in the GAO Report. In the case of the Canadian Wheat Board, the North Dakota Wheat Commission ("NDCW") is the single recipient of monies. The NDCW does not produce any hard red spring wheat ("HRS wheat") itself; rather the

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[25] Unfortunately, the GAO Study does not differentiate between little and no effect. Little effect would justify standing whereas no effect might not.

NWDC (among its other duties) promotes the sale of HRS wheat on behalf of farmers in North Dakota and sponsors research on HRS wheat. Testimony of Mr. Neal Fisher, Trial Transcript of March 27, 2006 Hearing at 14-17. Also problematic for the analysis is that the NDWC received Byrd Distributions, for the first time, in December 2005; moreover, because of this litigation, the NDWC has not earmarked the money from the distribution for any specific future use. Therefore, the NDWC does not have a track record on how it spends Byrd money nor does it have a plan on how it will spend that money, Testimony of Mr. Neal Fisher, Trial Transcript of March 27, 2006 Hearing at 28, 33. As a result, predicting the affect of this money becomes highly problematic given that some of the ways the NDWC may spend its distributions, *e.g.*, on research, may actually aid the Canadian Producers (so long as this expenditure has not freed up other money it would have spent on research but for the Byrd Distributions).

Similarly, U.S. Magnesium, the single beneficiary of Byrd Distributions collected from duties on Norsk's goods, has placed its previous distributions in a revolving account with its creditor. Also weighing into the consideration is that U.S. Magnesium has not, over the past two years, received substantial Byrd Distributions as a result of pending litigation over the underlying determination.

Nevertheless, the court is convinced that the Canadian Wheat Board and Norsk have standing. Although Byrd Distributions may only have trickled in over the past few years, cumulatively (and with future distributions) these monies are not

necessarily insignificant. Second, the U.S. General Accountability Office's survey demonstrates that Byrd recipients have used their distributions to enhance their competitive positions. GAO Report, *supra*, at 66, 70, 72, 77, 84, 102-04. Although the NDWC and U.S. Magnesium may not follow suit, all that plaintiffs must show is that it is probable. Third, in the case of U.S. Magnesium, it is conceded that the Byrd Distributions do lower its "weighted average cost of capital." Testimony of Dr. Teece, Trial Transcript of March 28, 2006 Hearing at 310-14. Such reduction of its costs of capital alters competitive conditions. *See id.* Likewise, although the NDWC only promotes HRS wheat, the NDWC promotion activities (with the assistance of U.S. Wheat Associates) have "helped to take back market share from Canadian Wheat in specific export markets[.]"Testimony of Mr. Neal Fisher, Trial Transcript of March 27, 2006 Hearing at 38. Therefore, it is unlikely that the money will not, in any way, alter the conditions of competition.[26]

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[26] Defendant also insists that Plaintiffs are required to demonstrate specific losses. Requiring the demonstration of actual losses would be contrary to the principle that plaintiffs need not wait until they are actually injured to have standing. *See, e.g., Bryant v. Yellen*, 447 U.S. 352, 367-68, 100 S. Ct. 2232, 65 L. Ed. 2d 184 (1980); *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 143, 95 S. Ct. 335, 42 L. Ed. 2d 320 (1974) ("One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593, 43 S. Ct. 658, 67 L. Ed. 1117, 1 Ohio Law Abs. 627 (1923)); *Alabama-Tombigbee Rivers Coal.*, 338 F.3d 1244, at 1254. Furthermore, the effect of subsidies may not be immediately clear; rather, the full effect of a subsidy may not be felt for years. *Cf. Ocean Advocates v.*

Therefore, the court finds that the Canadian Producers meet the injury-in-fact test.[27]

b) Causality and Redressability

Having found that the Byrd Amendment is likely to injure foreign competitors, the court next

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United States Army Corps of Eng'rs, 361 F.3d 1108, 1120 (9th Cir. 2004) *amended by, rehearing denied, rehearing en banc denied*, 402 F.3d 846 (2005); *Alliance for Clean Coal*, 44 F.3d at 594 ("But the showing of specific 'lost opportunities' is neither required to establish standing nor reasonably expected under the circumstances of this case."); *Lac Du Flambeau Band of Lake Superior Chippewa Indians*, 422 F.3d at 498 ("the present impact of a future though uncertain harm may establish injury in fact for standing purposes."); *Rental Hous. Ass'n of Greater Lynn, Inc. v. Hills*, 548 F.2d 388, 389 (1st Cir. 1977) ("specific proof of competitive injury is not possible, it could hardly be thought that administrative action likely to cause harm cannot be challenged until it is too late."); *Westport Taxi Serv., Inc. v. Adams*, 571 F.2d 697, 700-701 (2d Cir. 1978). For example, if a competitor uses the subsidy to build a new manufacturing facility, construction may take several years to be completed, and even more time to fully effect the market.

[27] The court further notes that the Defendant has acknowledged the likely effects of Byrd Distributions. In its reply brief, the Defendant argued that the Byrd Amendment "assists those United States domestic producers which have been harmed by unfair import competition," Def.'s Reply at 22, and "*accomplishes* the 'Findings of Congress' that the injurious effects of persistent unfair trade practices must be neutralized 'so that jobs and investment that should be in the United States are not lost through false market signals," *id.* at 26 (emphasis added). Note, the Defendant did not argue that is *feasible* that the Byrd Amendment works as designed, but rather that the Byrd Amendment *does* in fact work as designed. Therefore, it is disingenuous for the Defendant to now argue that plaintiffs' injuries are entirely speculative and hypothetical.

considers whether these injuries are traceable to the Byrd Amendment and whether judicial review may provide relief. In this case, these tests are easily met. Given that the Commissioner distributes such subsidies, the injury caused by these subsidies is directly traceable to the Commissioner's actions. Moreover, the injuries are redressable because an order enjoining such distributions will cause them to cease.

* * *

In sum, the court finds that the Canadian Producers have Article III standing.

ii. Canada's Standing

Canada argues that it has standing by virtue of the fact that it has suffered a breach of NAFTA by the United States. Canada asserts that Plaintiffs have standing to challenge breaches of contracts.[28] Canada further asserts that international agreements are (essentially) contracts between nations. *See, e.g, B. Altman & Co. v. United States*, 224 U.S. 583, 600, 32 S. Ct. 593, 56 L. Ed. 894,

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[28] The Defendant claims that a party's injury cannot be based on a violation of NAFTA under 19 U.S.C. § 3312(c) (discussed below). That provision, however, merely states that no person, other than the United States, shall have a cause of action based on NAFTA or Congressional approval thereof. Whether a party is injured for purposes of Article III is an entirely different inquiry than whether a party has a cause of action to bring a claim. Therefore, Section 3312(c) does not bar this injury. *Cf. Air Courier Conf.*, 498 U.S. at 523 n.3; *Republic of Para. v. Allen*, 949 F. Supp. 1269, 1273 (E.D. Va. 1996) (finding standing to challenge the United States' application of a treaty but concluding that plaintiffs did not have cause of action).

Treas. Dec. 32589 (1912). Canada avers that because the United States has violated NAFTA by (a) applying amendments to Canadian goods without the statute so specifically stating, (b) failing to consult with Canada prior to the Amendment's passage (if it does apply to Canada), and (perhaps) (c) applying an amendment to Canada that violated GATT, the United States has injured Canada within the meaning of the injury-in-fact requirement of Article III. Pl.'s Mem. at 16 (citing *Roeder v. Islamic Republic of Iran*, 357 U.S. App. D.C. 107, 333 F.3d 228, 234 (D.C. Cir. 2003), *Republic of Para. v. Allen*, 949 F. Supp. 1269, 1273 (E.D. Va. 1996), *Gov't of Jam. v. United States*, 770 F. Supp. 627, 630 n.6 (M.D. Fla. 1991)).

Even assuming *arguendo* that breaches of a contract *per se* confer standing on parties to the contract, and that international agreements are "contracts," Canada's analysis has failed to account for the fact that it has already elected a remedy for this breach of its contractual obligations by pursuing, and winning, its claim before the WTO, and by receiving compensation in accordance with the WTO decision. Although WTO adjudications may not be binding on the United States in requiring the United States to conform its regulatory law to adverse WTO decisions, *see Corus Staal BV v. DOC*, 395 F.3d 1343, 1347-49 (Fed. Cir. 2005), *cert. denied* 126 S. Ct. 1023, 163 L. Ed. 2d 853 (2006); *but see Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 386 n.24, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000); *Allegheny Ludlum Corp. v. United States*, 367 F.3d 1339, 1348 (Fed. Cir. 2004), it is nonetheless clear that legal consequences flow as a result of those

decisions, *i.e.*, adverse decisions require offending states to conform or compensate, see Andreas F. Lowenfeld, International Economic Law 158-61 (2002). *See generally Medellin v. Dretke*, 125 S. Ct. 2088, 2094, 544 U.S. 660, 161 L. Ed. 2d 982 (2005) (Ginsburg J., concurring); *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 463, 20 S. Ct. 168, 44 L. Ed. 223, 35 Ct. Cl. 623 (1899). In this case, the WTO's decision has led to compensation in the form of the suspension of Canada's trade concessions guaranteed to the United States (in contract parlance, garnishment of the United States' benefits under the agreement) - a fact that this court cannot refuse to recognize.

Alternatively, Canada claims that, despite its victory before the WTO, NAFTA aims at achieving free trade and that the United States' breach of NAFTA deprives Canada of this benefit. Retaliation, Canada claims, simply does not adequately compensate it for its contractual loses under NAFTA.[29] But Canada's contract analogy proves too much. Simply because a party might prefer an alternative remedy for a breach of contract to that which it received does not entitle a complaining party to additional remedies. *See, e.g., Hickson Corp. v. Norfolk S. Ry. Co.*, 260 F.3d 559, 567 (6th Cir. 2001); *Artis v. Norfolk & W. Ry Co.*, 204 F.3d 141 (4th Cir. 2000); *Sparaco v. Lawler, Matusky, Skelly Eng'rs, LLP*, 313 F. Supp. 2d 247 (S.D.N.Y.

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[29] NAFTA and the Uruguay Round Agreements are largely coextensive on this matter. *See, e.g.*, NAFTA art. 1902.2(d). Where, as here, they are coextensive, a violation of one injures a party to the same extent as a violation of the other.

2004) ("A plaintiff is not entitled to recover twice for the same injury."). *See also* Dan B. Dobbs, *Law of Remedies* § 9.4 (2nd ed. 1993). The WTO has provided a remedy intended to make Canada whole for its loses. *See United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS234/ARB/CAN P5.2 (Aug. 31, 2004). Although an election of a remedy does not prevent a party from seeking redress for legally distinct statutory rights, *see Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 50, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974), a party may not pursue duplicative or inconsistent remedies, *see generally Artis*, 204 F.3d at 146; *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1371 (7th Cir. 1990) (the election of remedies seeks to prevent double recovery); *Wynfield Inns v. Edward Leroux Group, Inc.*, 896 F.2d 483, 488-89 (11th Cir. 1990) (finding inconsistent a *quantum meruit* remedy and a contract remedy because the prior assumed the nonexistence of a contract where the latter presumed the existence of one). Here, if Canada prevails, the breach of the Uruguay Round Agreements will be effectively cured thereby undermining the contractual basis of the WTO's award and the compensation that Canada has thus far received. *Cf. id.* Therefore, by pursuing its action before the WTO, Canada has elected this remedy at the expense of others.

Furthermore, specific performance (which Canada seeks here) is generally disfavored as a remedy for a breach of contract. *See, e.g., Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 211, 122 S. Ct. 708, 151 L. Ed. 2d 635 (2002)

(canvassing authority). Equity disfavors specific performance partially because it is difficult for courts to compel recalcitrant parties to perform on contracts. Trade disputes between nations are no different. The drafters of the WTO understood this concept by pragmatically placing any remedy in the hands of the non-breaching party by permitting them to garnish the offending nation's trade concessions. These were the rules of the road when Canada petitioned the WTO for redress; and this was the remedy that it could expect. Although the court can appreciate that Canada may believe that it has been denied the benefit of its original bargain, the court cannot ignore that in fact it has already been compensated for this claimed injury in accordance with the contract upon which it relies to assert standing.[30] *Cf. Defenders of Wildlife*, 504 U.S.

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[30] Canada makes four additional arguments which warrant brief attention. First, Canada claims that it is seeking to enjoin future breaches of the Agreement. However, consistent with the WTO's decision, Canada may retaliate so long as the United States is in material breach of the Agreement and, therefore, Canada has an adequate remedy at law. *Cf. Lyons*, 461 U.S. at 112. Second, Canada claims it has standing because its statutory rights were violated. As discussed above, *see supra* at 43-44, the court does not adopt this view of standing. Third, Canada claims that Defendant has waived this argument. However, because this analysis flows from Canada's standing argument, and because standing cannot be waived, this argument must fail. Fourth, Canada claims that the WTO did not compensate it for distributions made prior to 2004. However, in its Complaint, Canada seeks disgorgement of distributions made only during and after 2004. Gov't Canada Compl. 9. Therefore, Canada has not asked the court to remedy this injury. Accordingly, this cannot provide a basis for the injuries for which Canada seeks redress, *i.e.*, distributions made during and after 2004. *Cf. Lyons*, 461 U.S.

at 560 (injury-in-fact is an indispensable requirement for standing which neither Congress, nor the executive, can displace).

Accordingly, the court finds that Canada lacks standing and, therefore grants Defendant's motion to dismiss in this respect.

B. Prudential requirements

As noted above, in addition to Article III's constitutional requirements for standing, courts have imposed a further limitation for cases brought under the APA. Recognizing the APA, this court's founding statute provides that: "any civil action of which the Court of International Trade has jurisdiction, . . . may be commenced in the court by any person adversely affected or aggrieved by agency action within the meaning of section 702 of Title 5." 28 U.S.C. § 2631(i). In turn, Title 5 section 702 (Section 10(a) of the APA), provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review." These provisions require that a party need only be "affected or aggrieved by agency action" in order to bring a claim. Accordingly, the statutes manifest "congressional intent to cast the standing net broadly -- beyond the common-law interests and substantive statutory rights upon which 'prudential' standing traditionally rested." *Akins*, 524 U.S. at 19. However, despite the low bar

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at 102-03. *See also Lewis v. Casey*, 518 U.S. 343, 357, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996) ("standing is not dispensed in gross").

set by Article III's standing requirement, and the APA's "'generous review provisions,'" *Data Processing*, 397 U.S. at 156 (quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51, 75 S. Ct. 591, 99 L. Ed. 868 (1955)), "it was [never] thought . . . that Congress, in enacting § 702, had . . . intended to allow suit by every person suffering injury in fact." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 395, 107 S. Ct. 750, 93 L. Ed. 2d 757 (1986). Therefore, courts have "supplied [a] gloss [to the APA's language] by adding to the requirement that the complainant be 'adversely affected or aggrieved,' *i.e.*, injured in fact, the additional requirement that 'the interest sought to be protected by the complainant [be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Id.* at 395-96 (quoting *Data Processing*, 397 U.S. at 153); *Dir., Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 126-27, 115 S. Ct. 1278, 131 L. Ed. 2d 160 (1995). This is the relevant prudential requirement for standing here.

In this case, Plaintiffs claim that the Commissioner's interpretation of the Byrd Amendment contravenes Section 408. Section 408, therefore, is the relevant statute under which to conduct the zone of interest analysis. *Nat'l Wildlife Fed'n*, 497 U.S. at 883 ("the plaintiff must establish that the injury he [or she] complains of . . . falls within the 'zone of interests' sought to be protected *by the statutory provision whose violation forms the legal basis for his complaint.*" (emphasis added)). *See also Bennett*, 520 U.S. at 175-76; *Air Courier*

Conf., 498 U.S. at 523-524.[31] According to the Supreme Court's most recent articulation of the zone of interest test in *NCUA*, 522 U.S. at 492, the court must "first discern the interests 'arguably . . . to be protected'" by Section 408, then "inquire whether the plaintiff's interests affected by the agency action in question are among them." (internal citation omitted).

In conducting this two-part analysis, the Supreme Court has further maintained that the "zone of interest" test operates under the presumption that agency actions are subject to judicial review, and therefore, "is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff[s]." *Clarke*, 479 U.S. at 399-400 (footnote omitted); *see also NCUA*, 522 U.S. at 488-89 ("Although our prior cases have not stated a clear rule for determining when a plaintiff's interest is 'arguably within the zone of interests' to be protected by a statute, they nonetheless establish that we should not inquire whether there has been a congressional intent to benefit the would-be

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[31] Defendant argues that the Byrd Amendment is the relevant statute and that, because the Byrd Amendment seeks to assist domestic industries, Plaintiffs' interests are inconsistent with the Byrd Amendment. However, as explained above, Section 408 is an interpretative rule that applies to all amendments to the antidumping and countervailing duty laws. Consequently, the Byrd Amendment, when read in conjunction with Section 408, authorizes Customs to distribute money except from duty orders on Canadian or Mexican goods, if those duty orders apply to goods. It is this explicit exception that Section 408 places on the Byrd Amendment and upon which Plaintiffs rely.

plaintiff."). Rather, the zone of interest test only "denies a right of review if the plaintiff's interests are . . . marginally related to or inconsistent with the purposes implicit in the statute . . . ." *Clarke*, 479 U.S. at 399. For the reasons explained below, it is clear that the Canadian Producers' interests are so sufficiently related to, and not inconsistent with, the purposes of Section 408 that those interests provide a basis for standing.

As noted above, Section 408 provides that "any amendment enacted after the Agreement enters into force with respect to the United States that is made to [the antidumping and countervailing duty laws] . . . shall apply to goods from a NAFTA country only to the extent specified in the amendment." As Plaintiffs correctly note, this provision operates under the auspices of a trade regime which otherwise fosters "conditions of fair competition." NAFTA, art. 102. *See generally* SAA, reprinted in H. R. Doc. No. 103-159, p. 3 (1993); Sykes, *supra*, at 14-15. Indeed, the main purpose behind the U.S. trade laws is to regulate the level of competition between foreign and domestic producers. *Cf. Zenith Radio Corp. v. United States*, 437 U.S. 443, 456, 98 S. Ct. 2441, 57 L. Ed. 2d 337 (1978) (countervailing duty laws are "intended to offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies paid by their governments."); *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 411, 48 S. Ct. 348, 72 L. Ed. 624, Treas. Dec. 42706 (1928) (noting a predecessor to the modern antidumping regime aimed at "protection that will avoid damaging competition to the country's industries by the importation of goods from other countries at too

low a rate to equalize foreign and domestic competition in the markets of the United States."); *Globe Metallurgical, Inc. v. United States*, 28 CIT__, __, 350 F. Supp. 2d 1148, 1157 (2004) *dismissed by* 403 F. Supp. 2d 1305 (2005) ("The goal of the [antidumping] statute is not punitive; the goal is to level the playing field for United States producers of similar goods with producers in an [other] country."). *Cf. Wheatland Tube Co. v. United States*, 30 CIT __, __, Slip Op. 06-08 at 22, 414 F. Supp. 2d 1271 (Jan. 17, 2006) (Antidumping "duties are intended to offset price discrimination from overseas competitive industries."). Therefore, by imposing a "magic words" rule on future amendments, the apparent purpose of Section 408 is to protect Canadian and Mexican importers from some statutory alterations of the competitive environment contemplated by the antidumping and countervailing duty laws in effect as of January 1, 1994.

Certainly, the Canadian Producers (as importers into the United States subject to antidumping and countervailing duty orders) have an interest in seeing that the antidumping and countervailing duty laws are not statutorily adjusted to alter the level of competition contemplated by these laws without Congress making its intent to amend these laws explicit. Because Plaintiffs' interests need only be "marginally related to . . . . [the] purposes implicit in the statute," *Clarke*, 479 U.S. at 399, the Canadian Producers' interest in maintaining the antidumping and countervailing duty laws as they existed in 1994 falls "arguably within the zone of interests to be protected or regulated by the statute," *Data Processing*, 397 U.S. at 153; *see also Hardin*, 390

U.S. at 6 ("when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision."). *Cf. Zenith Radio Corp.*, 437 U.S. at 457-58 (noting the reliance interests of foreign producers on both the continuity of U.S. laws, and the adherence to international legal principles); *Made in the USA Found.*, 242 F.3d at 1318.

Because prudential standing is satisfied when the injury asserted by a plaintiff "'arguably [falls] within the zone of interests to be protected or regulated by the statute . . . in question,'" *Akins*, 524 U.S. at 20 (quoting *NCUA*, 522 U.S. at 488), there are no prudential standing restraints to bar Plaintiffs' claims here, *accord United Food & Commer. Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 555-58, 116 S. Ct. 1529, 134 L. Ed. 2d 758 (1996) (holding that Congress may dispense with prudential standing requirements).

III. POLITICAL QUESTION DOCTRINE

Defendant also raises concern that the subject matter of the Plaintiffs' Complaints is not proper for judicial resolution. Specifically, Defendant asserts that "plaintiffs' complaints about the [Byrd Amendment] directly implicate foreign affairs and diplomacy, not matters properly addressed pursuant to the APA . . . [and therefore] present non-justiciable political questions and must be dismissed."[32] Def.'s Reply at 36.[33]

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[32] The court notes, by way of comparison, that Congress explicitly provided for judicial review in actions commenced by foreign governments. For example, 28 U.S.C. § 2631(c)

The political question doctrine is founded on the recognition that the federal government is composed of three branches of government, each with its own responsibilities. Under this separation of powers principle, courts have recognized that where a subject matter is exclusively assigned to a coordinate branch, or involves questions the political branches

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provides that "[a] civil action contesting a determination listed in section 516A of the Tariff Act of 1930 [19 U.S.C. § 1516a] may be commenced in the Court of International Trade by any interested party who was a party to the proceeding in connection with which the matter arose" where "the term 'interested party' [includes] . . . the government of a country in which such merchandise is produced or manufactured or from which such merchandise is exported," 19 U.S.C. § 1677(9)(B). Moreover, the legislative history of the court, as raised by Plaintiffs, evidence that "a major goal" in the creation of this Court, was the "enlargement of the class of persons eligible to sue in civil actions in the Court of International to include . . . foreign government and those who would otherwise be adversely affected or aggrieved by administrative decisions or litigation arising out of our international trade and tariff laws . . . ." *Customs Court Act of 1979: Hearing on S. 1654 Before the S. Subcomm. on Improvements in Judicial Machinery*, 96th Cong. 28 (1979). Reflective of this principle, this court has entertained cases brought by foreign governments. *See, e.g., Royal Thai Gov't v. United States*, 28 CIT__, 341 F. Supp. 2d 1315 (2004) *aff'd in part, rev'd in part Royal Thai Gov't v. United States*, 436 F.3d 1330, 2006 U.S. App. LEXIS 2415 (Fed. Cir. Feb. 1, 2006), *Gov't of Uzbekistan v. United States*, 25 CIT 1084 (2001), *see also Floral Trade Council v. United States*, 21 CIT 1401, 991 F. Supp. 655 (1997) (wherein the Government of Colombia was a defendant-intervenor).

[33] At oral argument, Defendant told the court that it intended this argument only to apply to Canada. However, because the Defendant referenced all plaintiffs in its briefs, the court will address the matter.

are better-suited to answer than the judicial branch, such a subject matter is not appropriate for judicial resolution. *See, e.g., Baker v. Carr*, 369 U.S. 186, 211, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).

As properly noted by Plaintiffs, Defendant's objection raised here is similar to the one directly rejected by the Supreme Court in *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 106 S. Ct. 2860, 92 L. Ed. 2d 166 (1986). In *Japan Whaling*, plaintiffs sought a writ of mandamus to compel the Secretary of Commerce ("Secretary") to certify that the Japanese whaling industry was diminishing the effectiveness of the International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849 (entered into force Nov. 10, 1948), and, as a consequence of certification, to prohibit the importation of fish products from Japan under the Pelly Amendment to the Fishermen's Protective Act of 1967, 22 U.S.C. § 1978. *Japan Whaling*, 478 U.S. at 221-28. The Secretary defended the decision not to certify Japan, *inter alia*, on the basis of an executive agreement reached between the United States and Japan in which Japan agreed to certain harvest limits with the cessation of whaling by 1988. *Id.*

Before the Supreme Court, the defendant-intervenors in *Japan Whaling* argued that the Supreme Court was precluded by the political question doctrine from entertaining plaintiffs' suits. Clearly rejecting this argument, the Supreme Court held that:

> Not every matter touching on politics is a political question . . . and more specifically,

that it is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." [*Baker v. Carr*, 369 U.S. 186, 211, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1969)]. The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill suited to make such decisions, as "courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature." *United States ex rel. Joseph v. Cannon*, 206 U.S. App. D.C. 405, 642 F.2d 1373, 1379 (1981) (footnote omitted), cert. denied, 455 U.S. 999, 102 S. Ct. 1630, 71 L. Ed. 2d 865 (1982).

As *Baker* plainly held, however, the courts have the authority *to construe treaties and executive agreements*, and *it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts.* It is also evident that the challenge to the Secretary's decision not to certify Japan for harvesting whales in excess of IWC quotas presents a purely legal question of statutory interpretation. The Court must first determine the nature and scope of the duty imposed upon the Secretary by the Amendments, a decision which calls for applying no more than the traditional rules of

> statutory construction, and then applying this analysis to the particular set of facts presented below. We are cognizant of the interplay between these Amendments and the conduct of this Nation's foreign relations, and we recognize the premier role which both Congress and the Executive play in this field. *But under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.* We conclude, therefore, that the present cases present a justiciable controversy, and turn to the merits of petitioners' arguments.

Japan Whaling, 478 U.S. at 229-30 (emphasis added).

The issues presented in Plaintiffs' case here are even more appropriate for judicial resolution than those in *Japan Whaling*. First, like plaintiffs' suit in *Japan Whaling*, Plaintiffs here are seeking enforcement of Customs' non-discretionary statutory obligation under Section 408. *Cf. Vieth v. Jubelirer*, 541 U.S. 267, 278, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (2004) (finding that the political question doctrine applies where there are no "standards" or "rules" to apply, and where no decision that is "principled, rational, and based upon reasoned distinctions," can be rendered."); *Nixon v. United States*, 506 U.S. 224, 228-29, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993).

Second, in *Japan Whaling* the Secretary was responsible for determining whether the Japanese whaling industries were "diminishing the

effectiveness of an international fishery conservation program," *Japan Whaling*, 478 U.S. at 225; not a very precise standard. In contrast, here, neither the Byrd Amendment nor Section 408 require any level of judgment call - the terms of the Byrd Amendment and Section 408 are clear and unqualified.

Third, because *Japan Whaling* involved matters of foreign relations where the President has inherent authorities, U.S. Const. art. II, §§ 2-3; *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320, 57 S. Ct. 216, 81 L. Ed. 255 (1936), the principles announced therein must be applicable in the arena of foreign commerce where the Constitution grants Congress plenary authority, *see, e.g.*, U.S. Const. art. I, § 8; *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 324, 114 S. Ct. 2268, 129 L. Ed. 2d 244 (1994); *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 85, 113 S. Ct. 1095, 122 L. Ed. 2d 421 (1993) (Blackmun, J. dissenting) ("The constitutional power over foreign affairs is shared by Congress and the President . . . but the power to regulate commerce with foreign nations is textually delegated to Congress alone." (citations omitted)). *Cf. Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 340, 94 S. Ct. 1146, 39 L. Ed. 2d 370 (1974) ("Taxation is a legislative function, and Congress . . . is the sole organ for levying taxes"); *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424, 110 S. Ct. 2465, 110 L. Ed. 2d 387 (1990) ("Our cases underscore the straightforward and explicit command of the Appropriations Clause. 'It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'" (quoting *Cincinnati Soap Co. v. United*

States, 301 U.S. 308, 321, 57 S. Ct. 764, 81 L. Ed. 1122, 1937-1 C.B. 317 (1937))). *Cf. Baker*, 369 U.S. at 217 (the political question doctrine applies when there exists a "textually demonstrable constitutional commitment of the issue to a coordinate political department"). Indeed, when the President exercises authority in regulating foreign commerce, he or she does so as Congress' "agent." *Field v. Clark*, 143 U.S. 649, 692-94, 12 S. Ct. 495, 36 L. Ed. 294 (1892); *see also Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 558-60, 96 S. Ct. 2295, 49 L. Ed. 2d 49 (1976); *J.W. Hampton Jr., & Co. v. United States*, 276 U.S. 394, 406-410, 48 S. Ct. 348, 72 L. Ed. 624, Treas. Dec. 42706 (1928); *B. Altman*, 224 U.S. at 602. Consequently, Customs is in no way authorized to avoid compliance with statutory law under the guise of international diplomacy. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio Law Abs. 417 (1952) (President not authorized to seize steel factory to secure production of war materials); *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 659-60 (4th Cir. 1953) ("whatever the power of the executive with respect to making executive trade agreements regulating foreign commerce in the absence of action by Congress, it is clear that the executive may not through entering into such an agreement avoid complying with a regulation prescribed by Congress."); *accord United States v. Yoshida Int'l, Inc.*, 526 F.2d 560, 572, 63 C.C.P.A. 15 (C.C.P.A. 1975) (noting that the President has no independent authority over foreign commerce).

Therefore, the decision in *Japan Whaling* precludes applying the political question doctrine to

bar Plaintiffs' suits here. Accordingly, this matter is not barred by the political question doctrine.[34]

IV. CAUSE OF ACTION

Defendant and Defendant-Intervenors also assert that U.S. law does not confer on Plaintiffs a cause of action for the complaints in this action. Def.'s Reply at 3, Def.-Int.'s Reply at 7. As noted above, Plaintiffs claim a right of action under the APA, 5 U.S.C. § 702, which presumptively provides judicial review of final agency actions. *See* 5 U.S.C. § 701(a); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670, 106 S. Ct. 2133, 90 L. Ed. 2d 623 (1986) (noting a "strong presumption that Congress intends judicial review of administrative action"); *accord Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349, 104 S. Ct. 2450, 81 L. Ed. 2d 270 (1984); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967). Nonetheless, this strong presumption in favor of reviewability, may be "overcome whenever the congressional intent to preclude review is 'fairly discernible in the statutory scheme,'" *Block*, 467 U.S. at 351 (quoting *Data Processing*, 397 U.S. at 157); *accord Abbott Labs.*, 387 U.S. at 141 (the presumption may be overcome by "clear and convincing evidence.").

In *Block*, the Supreme Court identified five types of evidence courts consider in determining whether judicial review is precluded:

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[34] Of, and to the extent, Defendant also raises this challenge pursuant to the APA, that argument was also rejected by the Supreme Court on the same basis in *Japan Whaling*.

> (1) specific statutory language, (2) specific legislative history, (3) contemporaneous judicial construction followed by Congressional acquiescence, (4) the collective import of the legislative and judicial history of the statute, and (5) inferences drawn from the statutory scheme as a whole.

III Richard J. Pierce, Jr., *Administrative Law Treatise* § 17.8 (4th ed. 2002) (citing *Block*, 467 U.S. at 349 (1983)); *accord United States v. Fausto*, 484 U.S. 439, 444, 108 S. Ct. 668, 98 L. Ed. 2d 830 (1987) (courts examine "the purpose [of the law], the entirety of its text, and the structure of review that it establishes."). Of particular importance to this inquiry is whether judicial review would frustrate the statutory objectives of the NAFTA Implementation Act. *See, e.g., Califano v. Sanders*, 430 U.S. 99, 108, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977); *accord Switchmen's Union of N. Am. v. Nat'l Mediation Bd.*, 320 U.S. 297, 304, 64 S. Ct. 95, 88 L. Ed. 61 (1943); *Morris v. Gressette*, 432 U.S. 491, 499-507, 97 S. Ct. 2411, 53 L. Ed. 2d 506 (1977).

In this case, Defendant-Intervenors point to Section 102(c) of the NAFTA Implementation Act, codified at 19 U.S.C. § 3312(c), which provides that "no person other than the United States . . . shall have any *cause of action* or *defense* under . . . the *Agreement* or by virtue of Congressional *approval thereof*[.]" 19 U.S.C. § 3312(c) (emphasis added). Defendant-Intervenors claim that this provides "specific statutory language" barring Plaintiffs' suits. *See also* 5 U.S.C. § 701(a) (the APA provides judicial review except where "statutes preclude judicial review"). Alternatively, the Defendant proposes that

the NAFTA Implementation Act (more generally) evidences Congressional intent to foreclose judicial review. Each argument will be addressed in turn.

1. "Approval Thereof" Does Not Extend to Implementing Legislation

Defendant-Intervenors assert that the words "Congressional approval thereof" includes the passage of the implementing legislation, and that therefore neither the Agreement nor any of the provisions incorporated into U.S. law with the passage of the *implementing* legislation provide a cause of action. Def. Int.'s Resp. at 8. Under Defendant-Intervenors' theory, the NAFTA Implementation Act approved NAFTA, and by consequence of this approval, implemented the Agreement. The "fast track" process meant that Congress approved and enacted such agreements through a *single* vote. *Id.* Accordingly, Defendant-Intervenors claim, Congress could not have intended there to be rights of action stemming from the implementing legislation. *Id.* Therefore, so the argument goes, the bar on rights of action extends to actions such as this one which is based on the implementing legislation. Specifically, even though Plaintiffs' actions are brought pursuant to Section 408 of the NAFTA Implementation Act, 19 U.S.C. § 3438, Defendant-Intervenors argue that Plaintiffs' actions are foreclosed.

There are three reasons this argument fails: (1) the text and history of the NAFTA Implementation Act refute this theory; (2) general principles of foreign relations law distinguish between approving an international agreement and the passage of

legislation implementing that agreement; and (3) such a reading would produce absurd results.

(A) The text and history of the NAFTA Implementation Act refute this theory

First, the text and history of the NAFTA Implementation Act establish that Congress' reference to the "approval of the Agreement" does not include *enactment of the Implementation Act.* Accordingly, the text and history of the NAFTA Implementation Act clearly refute Defendant-Intervenors' theory.

As noted above, the NAFTA Implementation Act was enacted under the legislative procedure referred to as "fast track." *See* 19 U.S.C. § 2191 *et seq.*; *see also* 19 U.S.C. § 2901 et seq.[35] The "fast track" legislation recognized the complementary constitutional division of power between the executive and Congress in the area of foreign commercial agreements. Because constitutional authority over foreign commerce is exclusively granted to Congress, U.S. Const. art. I, § 8, but the authority to negotiate commercial agreements with foreign nations is vested in the President, U.S. Const. art. II, § 2, the President and Congress agreed to a procedure that would co-ordinate their respective responsibilities to a common, rather than a conflicting, end. The result was the passage of

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[35] The version of "fast track" authority employed for the passage of NAFTA expired in 1994. The current version of "fast track," called "Bipartisan Trade Promotion Authority Act," was adopted by Congress in 2002. *See* 19 U.S.C. § 3801 *et. seq.* (West Supp. 2005).

legislation, establishing the "fast track," wherein Congress authorized the President to negotiate trade agreements within certain parameters, while agreeing to expeditious consideration of, and an up-or-down vote on, any agreements and on the legislation proposed to implement those agreements. *See* 19 U.S.C. § 2191 *et seq.*; 19 U.S.C. § 2901 *et seq.*

As is relevant here, "fast track" required that before any trade agreement "entered into force," the President would submit to Congress three separate documents: (i) the text of the agreement, (ii) the implementing legislation, and (iii) a statement of administrative action. 19 U.S.C. § 2903(a)(1)(B), (i)-(iii);[36] *see also* 19 U.S.C. § 2191(b)(1)(A).[37]

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[36] Title 19 Section 2903(a) provides in relevant part:

> Implementation of trade agreements
>
> (a) In general.
>
> (1) Any agreement entered into under [19 U.S.C. § 2902(b) or (c)] shall enter into force with respect to the United States if (and only if) –
>
> (A) the President, at least 90 calendar days before the day on which he enters into the trade agreement, notifies the House of Representatives and the Senate of his intention to enter into the agreement, and promptly thereafter publishes notice of such intention in the Federal Register;
>
> (B) after entering into the agreement, the President submits a document to the House of Representatives and to the Senate containing a copy of the final legal text of the agreement, together with—
>
> (i) a draft of an implementing bill,
>
> (ii) a statement of any administrative action proposed to implement the trade agreement, and

Significantly, any agreement could only enter into force after the implementing bill was "enacted" into law. 19 U.S.C. § 2903(a)(1)(C). This provision recognized and protected Congress' authority over legislation implementing any agreement. The clear requirement under "fast track" that three separate documents be submitted to Congress shows the intention that approval of the agreement is distinct from the instrument of legislation implementing that agreement.

(iii) the supporting information described in paragraph (2); and

(C) the implementing bill is enacted into law.

[37] Title 19 Section 2191(b) provides, in relevant part:

Definitions. For purposes of this section—

(1) The term "implementing bill" means only a bill of either House of Congress which is introduced as provided in subsection (c) . . ., submitted to the House of Representatives and the Senate under [19 U.S.C. § 2112, 19 U.S.C. § 3572 or 19 U.S.C. § 3805(a)(1)] and which contains—

(A) a provision approving such trade agreement or agreements or such extension,

(B) a provision approving the statement of administrative action (if any) proposed to implement such trade agreement or agreements, and

(C) if changes in existing laws or new statutory authority is required to implement such trade agreement or agreements or such extension, provisions, necessary or appropriate to implement such trade agreement or agreements or such extension, either repealing or amending existing laws or providing new statutory authority.

Following this "fast track" framework, in passing the NAFTA Implementation Act, *see* 19 U.S.C. § 3311(a), Congress: (1) approved NAFTA (thereby approving the United States' international legal obligations specified by the Agreement); (2) approved the statement of administrative action;[38] and (3) amended the statutory law of the United States to conform to NAFTA. That Congress considered these three distinct actions is best evidenced by Section 101(a) of the NAFTA Implementation Act, codified at 19 U.S.C. § 3311(a), in which Congress "approved" separately -- "(1) the North American Free Trade Agreement entered into on December 17, 1992, with the Governments of Canada and Mexico and submitted to the Congress on November 4, 1993; and (2) the statement of administrative action proposed to implement the Agreement that was submitted to the Congress on November 4, 1993." Noticeably absent from this "approval" was mention of the implementing *legislation* itself. Equally significant, regarding the third requirement, the Statement of Administrative Action, Congress separately noted its approval of the Statement of Administrative Action and (therefore) did not consider approval of the Agreement to include, in and of itself, approving anything more than the Agreement. *See* SAA,

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[38] The Statement of Administrative Action was the Executive Branch's proposal on how it would implement the Agreement, *see* 19 U.S.C. § 2903(a)(1)(B)(ii), 19 U.S.C. § 3311(a)(2), which was specifically and separately approved by Congress, 19 U.S.C. § 3311(a)(2); *cf.* 19 U.S.C. § 3512(d) (noting that the SAA for the Uruguay Round Agreements Act is the "authoritative expression" of the United States concerning the interpretation of the Uruguay Round Agreements Implementation Act).

reprinted in H. R. Doc. No. 103-159, p. 5 (1993) ("Section 101(a) of the bill provides Congressional approval for the NAFTA and this Statement.").

As is apparent from both the "fast track" process and Section 101(a) of the NAFTA Implementation Act, Congress considered the implementation of the Agreement to be separate from, and not a part of, the "approval" of the Agreement itself. Therefore, when Congress employed the term "approval thereof" in Section 102(c), it meant to encompass only its approval of the Agreement, *see* SAA, reprinted in H. R. Doc. No. 103-159, p. 13-14 (1993) ("The prohibition of a private right of action based on the NAFTA, or on Congressional approval of the agreement *in section 101(a)* . . . ." (emphasis added)), and did not bar actions brought under the *implementing* legislation, *see* SAA, reprinted in H. R. Doc. No. 103-159, p. 13 (1993) ("Section 102(c) of the implementing bill precludes private right of action or remedy against a federal, state or local government, or against a private party, *based on the provisions of the NAFTA* or of the labor or environmental supplemental agreements." (emphasis added)).

This reading is supported by the fact that Congress knew how to refer to the implementation of the Agreement when it so intended. *See, e.g.*, North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat 2057, Preamble ("A Bill To Implement the North American Free Trade Agreement"); Section 1 (noting that the Act may be cited as the North American Free Trade Agreement Implementation Act); Section 101(b)(1)(A) (if the President determines that "such country has implemented the statutory changes" he may

exchange notes with Canada and Mexico providing for entry into force of NAFTA); Section 101(b)(1)(B)(ii) (the President must provide to Congress a report on how Canada and Mexico have ensured the "effective implementation of the binational panel review process"); Section 202(a)(1) ("For purposes of implementing the tariff treatment"). This is especially compelling here where Congress was required to "enact," not "approve," the implementing legislation. Compare 19 U.S.C. § 2903(a)(1)(C) (an agreement will enter into force only after "the implementing bill is enacted into law") *with* Pub. L. 103-82, 107 Stat 2057 ("A Bill To Implement the North American Free Trade Agreement. *Be it enacted* . . ."); *cf.* 1 U.S.C. § 101 ("The enacting clause of all Acts of Congress shall be in the following form: 'Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.'"); H.R. Rep. No. 103-826 at 25 (1994) ("This treatment is also consistent with the Congressional view that necessary changes in Federal statutes should be specifically enacted, not preempted by international agreements."). Given that Congress has demonstrated that it knows how to refer to implementing legislation, the court cannot conclude that "approval of the Agreement" means, or extends to, barring actions under the implementing legislation itself. *Cf. EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 258, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991) (evidence that Congress used express language in other statutory provisions sufficient to satisfy that the presumption against extraterritoriality had not been overcome); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476, 123 S. Ct.

1655, 155 L. Ed. 2d 643 (2003) (evidence that Congress used different language in other statutory provisions did not upset reliance on using corporate law principles in construing the Foreign Sovereign Immunities Act). Therefore, both the text and history of the NAFTA Implementation Act indicate that Congress did not intend the "approval thereof" language of Section 102(c) to bar Plaintiffs' action. Accordingly, because Plaintiffs' cause of action is based on the Implementation Act, and not on the Agreement, the cause of action is not barred by 19 U.S.C. § 3312 (c).

B. "Approval" is also separate from implementation legislation when viewed in context of foreign relations law

The court's reading of § 102(c) of the NAFTA Implementation Act is confirmed when the term "approval" is viewed in the context of U.S. foreign relations law. The word "approval," used for Congressional-executive agreements, is the equivalent to the word "ratification" used for treaties, and does not extend to separate legislative enactment. *See, e.g., Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (2003) ("the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic."); Lord McNair, *The Law of Treaties* 130 (1961) (Ratification means "loosely and popularly, the approval of the legislature or other State organ whose approval may be necessary.").

Primarily, an international agreement, be it a treaty or a congressional-executive agreement, creates legal obligations on the international level. *Cf.* Vienna Convention on the Law of Treaties, 8 I.L.M. 679 (1969) at Article 2(b) ("Ratification", "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by [an international agreement]."). Secondarily, a treaty may be self-executing upon ratification. *See Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314, 7 L. Ed. 415 (1829) ("Our Constitution declares a treaty to be the law of the land . . . [it is regarded as] equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision."). When this is the case, the treaty acts in the same manner as an Act of Congress. *See, e.g., Medellin v. Dretke*, 125 S. Ct. 2088, 2103, 544 U.S. 660, 161 L. Ed. 2d 982 (2005) (O'Connor, J. dissenting) (noting that Article 36 of the Vienna Convention on Consular Relations was self-executing); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699, 108 S. Ct. 2104, 100 L. Ed. 2d 722 (1988) (holding that the Hague Service Convention is self-executing); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252, 104 S. Ct. 1776, 80 L. Ed. 2d 273 (1984) (finding the Warsaw Convention self-executing). Thirdly, just like domestic statutes, agreements may also create private rights of action whereby private parties may enforce the agreement in courts. *See Jogi v. Voges*, 425 F.3d 367, 376-85 (7th Cir. 2005); Louis Henkin, *Foreign Affairs and the United States Constitution* 176-230 (2nd ed. 2002).

As noted, only some treaties embrace the second and third attributes, *i.e.*, only some treaties, after ratification, may be self-executing and may create private rights of action; when they do not, Congress must separately enact legislation to implement any agreement if it wants to give the agreement effect under U.S. law. This analysis is equally applicable to congressional-executive agreements, *see, e.g., B. Altman & Co. v. United States*, 224 U.S. 583, 601, 32 S. Ct. 593, 56 L. Ed. 894, Treas. Dec. 32589 (1912), and executive agreements, *see, e.g., Garamendi*, 539 U.S. at 415-17; *Dames & Moore v. Regan*, 453 U.S. 654, 679, 101 S. Ct. 2972, 69 L. Ed. 2d 918 (1981), which, with certain limitations, are treated the same as treaties under the law, *see, e.g., Weinberger v. Rossi*, 456 U.S. 25, 102 S. Ct. 1510, 71 L. Ed. 2d 715 (1982); *B. Altman & Co.*, 224 U.S. at 602; *cf.* Restatement (Third) The Foreign Relations Law of the United States P301 (1990), Vienna Convention on the Law of Treaties, supra, at Article 2(a), *Made in the USA Found. v. United States*, 242 F.3d 1300, 1314 (11th Cir. 2001).

Accordingly, when using the term "approval" in Section 101(a), Congress was only speaking to its consent to the "ratification" of the Agreement under international law. Therefore, when Congress again used the term "approval" in Section 102(c), it did so to make abundantly clear that no act taken by the United States, *i.e.*, neither the Agreement or Congress' consent thereto, would create a right of action under NAFTA itself. Cf. Hal Shapiro & Lael Brainard, *Trade Promotion Authority Formerly Known as Fast Track: Building Common Ground on Trade Demands More Than a Name Change*, 35 Geo.

Wash. Int'l L. Rev. 1, 13 (2004) ("Congressional approval of an agreement, rather, has the effect of giving the United States new obligations under international law, but the implementing bill defines the domestic application of the agreement.").

Apart from merely approving the Agreement however, Congress has separately implemented portions of that Agreement by enacting specific provisions into domestic law. SAA, reprinted in H. R. Doc. No. 103-159, p. 1 (1993) ("The bill approves *and* makes statutory changes required or appropriate to implement the Agreement." (emphasis added)); *Corrpro Cos. v. United States*, 433 F.3d 1360, 1361 (Fed. Cir. 2006) (noting that Section 102(c) approved and implemented NAFTA). Accordingly, Section 102(c) does not foreclose rights of action under this latter enactment by Congress, *i.e.*, the NAFTA Implementation Act and specifically Section 408, 19 U.S.C. § 3438.

(C) Absurd Results

Defendant-Intervenors' argument would also have perverse consequences. For example, 19 U.S.C. §§ 3331 & 2 provide duty free treatment when an import originates in the territory of a NAFTA nation. Section 3332 was part of the NAFTA Implementation Act. Suppose Customs blatantly ignored Section 3332 despite the importer's protests, and commenced a collection action under 19 U.S.C. § 1592(d) to collect duties at the pre-NAFTA level; were Section 102(c) to be read to bar the recognition of a cause of action or *defense* under the Implementation Act, the importer would have no defense under 19 U.S.C. §§ 3331 & 2. Alternatively,

if Defendant-Intervenors were correct, a person could not bring a protest under 19 U.S.C. § 1514(a), to contest a Customs' determination which improperly interpreted any amendment to the Harmonized Tariff Schedule of the United States ("HTSUS") based on NAFTA.[39]

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[39] Section 102(c) does not discriminate between rights of action under the APA or any other statutory provision; therefore, the same result must obtain regardless of which statutory provision plaintiffs invoke as the basis of their cause of action. *See Fausto*, 484 U.S. at 443 (finding actions foreclosed under numerous statutory provisions, including, but not limited to, the APA); *Lopez v. United States*, 309 F. Supp. 2d 22, 27 (D.D.C. 2004) (finding that claims under NAFTA were barred under "any provision of law"). Customs appears to suggest that actions may be brought to enforce the HTSUS, which it argues, is analytically different than the implementing legislation. Customs' argument fails to take into account that the HTSUS consists of: (a) Congressionally enacted provisions as of 1989; (b) statutory amendments since 1989; and (c) "each modification or change made to the Harmonized Tariff Schedule by the President under authority of law." 19 U.S.C. § 3004(c)(1); *see also United States v. Haggar Apparel Co.*, 526 U.S. 380, 388-89, 119 S. Ct. 1392, 143 L. Ed. 2d 480 (1999). Significantly, at the core of the HTSUS, exists the recognition that the President may be authorized to "proclaim" changes to the HTSUS "to effect the import treatment necessary or appropriate to carry out, modify, withdraw, suspend, or terminate, in whole or in part, *trade agreements*." 19 U.S.C. § 3004(c)(2)(A) (emphasis added). In regard to NAFTA, Congress explicitly provided the President authority to proclaim changes to the HTSUS necessary or appropriate in effecting deals reached as a result of the NAFTA negotiations. *See, e.g.*, 19 U.S.C. §§ 2902, 3332(q). In sum, not only are the changes to the HTSUS made pursuant to the NAFTA Implementation Act, but also, the fact that Customs' recognizes that such proclamations may give rise to causes of actions underscores that Congress did not intend to foreclose private actions

Similarly, if Defendant-Intervenors' theory were correct, Defendant-Intervenors themselves would not be able to assert a Section 102(c) defense here because Section 102(c) is part of the enabling legislation, and Defendant-Intervenors are private parties. Therefore, their own defense, based on Section 102, would preclude private parties from raising defenses under the implementing legislation (which includes Section 102(c)). This would frustrate the very objectives of that provision.

Likewise, the United States agreed in NAFTA to amend its statutory law to conform with the Agreement. That domestic law was to be modified demonstrates the importance that the new statutory provisions and amendments would have in protecting the rights of the NAFTA parties and their exporters. *See, e.g.*, 19 U.S.C. § 3311(b)(1)(A) (requiring the President to assure that NAFTA parties "implemented the statutory changes necessary to bring that country into compliance with its obligations" before exchanging notes of approval). Hence, the Defendant-Intervenors' argument cannot be sustained.

* * *

The court appreciates that the conclusion reached here is contrary to that reached by Judge Coyle in *Bronco Wine Co. v. U.S. Dep't of Treasury*, 997 F. Supp. 1318, 1322 (E.D. Cal. 1997)[40] which held that

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brought under provisions implementing the NAFTA Agreement.

[40] Defendant-Intervenors note that this decision was affirmed by *Bronco Wine Co. v. BATF*, 1999 U.S. App. LEXIS 2130 (9th

the enabling legislation of the Uruguay Rounds Agreement Acts, 19 U.S.C. § 3512(c), did not create a right of action under the APA. Nevertheless, the United States' judiciary is specifically divided into circuits to foster thoughtful discussion of law, while providing uniformity through appellate review by the Supreme Court.

2. Implication

Alternatively, the Defendant claims that this case is "in reality" a claim under NAFTA. Def.'s Reply at 5,6. Given that it is "fairly discernible" that Congress meant to foreclose any NAFTA claim, Defendant claims, judicial review is foreclosed here. *Id.* The Defendant also argues that some provisions of the NAFTA Implementation Act are meant only to ensure promises to the NAFTA party governments,

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Cir. 1999). The Ninth Circuit's decision was unpublished. Pursuant to the Ninth Circuit's rules, "unpublished dispositions and orders of this Court are not binding precedent . . . [and generally] may not be cited to or by the courts of this circuit . . . ." *Hart v. Massanari*, 266 F.3d 1155, 1159 (9th Cir. 2001) (quoting Ninth Cir. R. 36-3). Accordingly, this court will not attribute weight to the Ninth Circuit's affirmation of the district court.

Moreover, other courts have relied upon the NAFTA Implementation Act in reviewing agency actions. *Xerox Corp. v. United States*, 423 F.3d 1356, 1364 (Fed. Cir. 2005); *see also Miss. Poultry Ass'n v. Madigan*, 31 F.3d 293, 303 (5th Cir. 1994); *but cf. Timken Co. v United States*, 354 F.3d 1334 (Fed. Cir. 2004) (noting in dicta that Section 3512(c) bars actions "against the government on the ground that Commerce acted inconsistently with the Uruguay Round Agreements Act" but then deciding that Commerce (properly) applied Section 229(b) of the Uruguay Rounds Agreement Act, codified at 19 U.S.C. § 1677(35)(A)).

and therefore, implicitly exclude private parties from raising claims thereunder.

"In reality," however, the Plaintiffs' claims are advanced under an Act of Congress, 19 U.S.C. § 3438, *See* 19 U.S.C. 3312(a)(2) ("Nothing in this Act shall be construed . . . to amend or modify any law of the United States . . . unless specifically provided for in this Act."), not the Agreement itself, *cf. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 386 n.24, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000) (rejecting a similar argument in relation to the Uruguay Round Agreements Act in using WTO proceedings as evidence in construing an Act of Congress); *NSK Ltd. v. United States*, 29 CIT__ ,__ n.6, 346 F. Supp. 2d 1312, 1322 n.6 (2004). Therefore, the proper focus of the inquiry is not whether claims under NAFTA are permissible, but rather, whether Congress foreclosed judicial review under Section 408.

Here, Congress' intent to foreclose claims brought under NAFTA does not implicate claims brought under Section 408. Indeed, because Congress made explicit its foreclosure of rights of action under the Agreement, its failure to explicitly foreclose rights under the implementing legislation itself indicates that Congress intended to permit rights of action under that implementing legislation. *Cf. Amgen, Inc. v. Smith*, 360 U.S. App. D.C. 88, 357 F.3d 103, 112-113 (D.C. Cir. 2004). The Supreme Court has repeatedly held that the reverse is true, *i.e.*, that when Congress explicitly authorizes rights of actions for some claims but not others, no right of action exists for those claims not so enumerated. *See, e.g., Fausto*, 484 U.S. at 448-49; *United States v. Erika, Inc.*, 456 U.S. 201, 208, 102 S. Ct. 1650, 72 L. Ed. 2d

12 (1982); *Switchmen's Union of N. Am.*, 320 U.S. at 305-306. It seems apparent to the court that this principle must also mean that Congressional foreclosure of some causes of action implies that others are appropriate for judicial review. This conclusion also follows from the APA's strong presumption in favor of judicial review, *cf. Abbott Labs.*, 387 U.S. at 140 ("The question is phrased in terms of 'prohibition' rather than 'authorization.'"), and from the generous statutory provision of standing for complaining parties, *see* 28 U.S.C. § 2631(i) (permitting causes of action to enforce the administration of trade laws). In sum, there can be no indirect prohibition precluding review here.

Defendant's argument that Congress excluded the right of private parties to enforce obligations owing to their governments is also unpersuasive for the same reasons.[41] Section 408 provides meaningful procedural protections to both the Government of Canada and to its private exporters. Both benefit from the forebearance promised by Section 408.

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[41] Interestingly, the United States' obligation to consult with Canada and Mexico prior to any amendment was not part of the NAFTA Implementation Act. In other words, those obligations that were truly sovereign in nature were simply not included as part of the implementing legislation. Moreover, U.S. trade laws have long recognized private rights of action based on U.S. obligations owed to foreign sovereigns. *See, e.g., B. Altman & Co. v. United States*, 224 U.S. 583, 601, 32 S. Ct. 593, 56 L. Ed. 894, Treas. Dec. 32589 (1912); *Field v. Clark*, 143 U.S. 649, 690-94, 12 S. Ct. 495, 36 L. Ed. 294 (1898); *accord Oldfield v. Marriott*, 51 (10 How.) U.S. 146, 161, 13 L. Ed. 364 (1851). Of course, trade agreements exist for the benefit of importers and exporters.

In addition, Defendant has failed to explain how Plaintiffs' actions would frustrate the legislation's statutory objectives. Neither the Byrd Amendment, nor Section 408, are discretionary in nature, *cf. Webster v. Doe*, 486 U.S. 592, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988) (the CIA Director's authority to discharge employees, when it was necessary or advisable "exuded deference"); *United States v. George S. Bush & Co.*, 310 U.S. 371, 380, 60 S. Ct. 944, 84 L. Ed. 1259 (1940) (delegating the President authority to make "necessary or appropriate" modifications to the tariff schedule precluded judicial review); nor would allowing rights of action frustrate Customs' deliberative process because there is none in this matter; Customs' duty is non-discretionary, *cf. Switchmen's Union of N. Am.*, 320 U.S. at 305-306 (finding that the National Mediation Board was intended to be a referee of explosive and pressing matters, rendering judicial review of its decision inappropriate). Indeed, Section 408's emphatic terms specifically provide for, rather than against, enforcement.

V. MERITS

Having satisfied itself that jurisdiction exists, and that the Canadian Producers have a cause of action, the court turns to the merits.

As discussed above, Section 408 provides that:

> Any amendment enacted after the Agreement enters into force with respect to the United States that is made to--
>
> > (1) section 303 or title VII of the Tariff Act of 1930 [19 U.S.C. §§ 1671 *et seq.*], or any successor statute, or

(2) any other statute which--

(A) provides for judicial review of final determinations under such section, title, or successor statute, or

(B) indicates the standard of review to be applied,

shall apply to goods from a NAFTA country only to the extent specified in the amendment.

Section 408, however, is not of universal applicability with respect to any amendment passed by Congress that could alter U.S. laws with respect to NAFTA parties. Rather, it applies only where: (1) Congress has enacted an amendment to specific and particular laws; (2) that amendment was enacted after NAFTA entered into force; (3) only in instances where any administering authority is applying that amendment to goods from a NAFTA country; and (4) the amendment is silent on its applicability to goods from Canada and/or Mexico.

In this case, the Byrd Amendment amended title VII of the Tariff Act of 1930, *see* 114 Stat. 1549, 1549A-72; Congress enacted the Byrd Amendment after NAFTA entered into force with respect to the United States, *id.*; and the Byrd Amendment fails to specify its applicability to Canada or Mexico, *id.* Moreover, the Byrd Amendment, unless read in conjunction with Section 408, amended the antidumping and countervailing duty laws with respect to trade remedies imposed upon goods that have entered into the United States from Canada and Mexico.

Despite the fact that the plain language of Section 408 appears to mandate that Customs should not apply the Byrd Amendment to goods from Canada or Mexico, Defendant and Defendant-Intervenors insist (1) that because the Byrd Amendment relates to proceeds of antidumping and countervailing duty orders, its does not "apply to goods" from Canada or Mexico; (2) the Byrd Amendment supersedes Section 408; and (3) any other interpretation would interfere with Congress' broad spending power. Each objection will be addressed in turn.

A) The Byrd Amendment is covered by Section 408

Defendant and Defendant-Intervenors insist that the Byrd Amendment relates only to proceeds collected from antidumping and countervailing duty orders. *See, e.g.*, Def.'s Reply at 45, Def.-Int.'s Reply at 63 ("Section 3438 does not cover all amendments to Title VII. Section 3438, however, by its own terms, applies only to Title VII amendments that apply to goods. The [Byrd Amendment] applies to money, not goods."). Therefore, Defendants assert, Byrd Distributions do not "apply to goods" and consequently, fall outside the scope of Section 408.

Specifically, Defendant, citing to numerous definitions of goods, argues that money collected by Customs is not goods. However, Defendant's attempt to read the "apply to goods" clause, in this manner, violates the "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the

context in which it is used." *Deal v. United States*, 508 U.S. 129, 132, 113 S. Ct. 1993, 124 L. Ed. 2d 44 (1993)). This failure to consider the context in which the "apply to goods" clause is used leads Defendant to erroneously interpret this clause.

When Section 408 is triggered, it does not render an amendment to the trade laws null and entirely void; rather, Section 408 demands that preferential treatment be given to goods from Canada and Mexico by exempting such goods from the auspices of any qualifying amendment. The "apply to goods" clause simply imposes a rule of origin requirement thereby articulating which type of imports are exempted from any amendment. Absent the "apply to goods clause," Section 408 would state that no amendment "shall apply to a NAFTA party" leaving an ambiguous rule of origin, *i.e.*, whether Section 408 covers just goods imported from Canada or Mexico by an importer who is a national of a NAFTA party, any importer importing from a NAFTA party, or any national from a NAFTA party importing from anywhere in the world. By including the "apply to goods" clause, this potential ambiguity disappears, especially in light of the NAFTA Implementation Act's rules of origin provisions, *see, e.g.*, NAFTA Implementation Act, Section 202(a) ("Originating goods").

This reading is supported by the fact that goods are not used in administering and effectuating the purposes of the antidumping and countervailing duty laws; rather, they are the subject matter, and the only subject matter, regulated by those laws, *see Eurodif S.A. v. United States*, 411 F.3d 1355, 1361 (Fed. Cir. 2005) (noting that the antidumping

statute only applies to goods); 19 U.S.C. § 1671(a) (imposing the same requirement for the countervailing duty statute). Therefore, the "apply to goods" clause must speak to how the antidumping and countervailing duty laws are administered in relation to goods.

For example, Defendant and Defendant-Intervenors assert that if Congress should find that Commerce is systematically understating dumping margins and therefore amends the antidumping and countervailing duty laws to require Customs to augment all duty margins by five percent, Section 408 would be triggered precluding this amendment from applying to imports from Canada or Mexico. *Cf.* Def.-Int.'s Reply at 66 (arguing that amendments to the rate of duty would trigger Section 408). However, under Defendant's reading of Section 408, this hypothetical amendment does not apply to "goods," it applies to a rate of duty. Alternatively, Defendant-Intervenors suggest that if Congress changes the rules on proprietary information used in antidumping and countervailing duty proceedings, then Section 408 would be triggered. Def.-Int.'s Reply at 73 n.50. But again, proprietary information is not "goods" either. In other words, Defendant and Defendant-Intervenors' argument would foreclose Section 408 in scenarios where Section 408 must obviously apply.

Relatedly, Defendant-Intervenors argue that the "apply to goods" clause limits Section 408 to amendments that *directly* apply to goods; because the Byrd Amendment *indirectly applies* to goods, Defendant-Intervenors claim, Section 408 is not triggered. *See, e.g.*, Def.-Int.'s Reply at 75. But this

reading stretches the language of Section 408 beyond recognition; there is simply no means or basis for distinguishing between *direct* and *indirect* applications of any amendment. *Cf.* SAA, reprinted in H. R. Doc. No. 103-159, p. 203 (1993) ("Section 408 of the bill implements the requirement of Article 1902 that amendments to the AD and CVD laws shall apply to a NAFTA country only if the amendment so states explicitly."). Indeed, such a distinction is belied by Section 408's use of the term "any," *i.e.*, that "any amendment" to the enumerated laws shall not apply. Consequently, that Congress sought to change the competitive conditions through disbursements to affected domestic producers, rather than to increase the rate of duty directly, is of no moment.[42]

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[42] For the most part, tariffs are but a means to an end, not an end in-and-of themselves. The end, of course, is regulating the level of competition domestic producers should face from foreign competitors; by adjusting the tariff rate, Commerce increases the cost to importers of selling in the domestic market, which, in turn, ameliorates the competitive conditions for domestic producers. Indeed, for the most part, the tariff is passed onto the consumer, with the harm to the importer being the increase in the price of its goods vis-a-vis domestic producers. *Cf. Bacchus Imp., Ltd. v. Dias*, 468 U.S. 263, 267, 104 S. Ct. 3049, 82 L. Ed. 2d 200 (1984); *accord United States v. Butler*, 297 U.S. 1, 63 n.10, 56 S. Ct. 312, 80 L. Ed. 477, 1936-1 C.B. 421 (1936) ("The enactment of protective tariff laws has its basis in the power to regulate foreign commerce." (citing *Bd. of Trustees of the Univ. of Ill. v. United States*, 289 U.S. 48, 58, 53 S. Ct. 509, 77 L. Ed. 1025, Treas. Dec. 46306 (1932))). In other words, the Byrd Amendment magnifies the effect of the antidumping or countervailing duty. When properly framed, it is apparent that a subsidy to domestic producers is no more indirect than a tariff itself.

Nor are Defendant-Intervenors' arguments sound as a practical matter because both the intent[43] and effect[44] of the Byrd Amendment is to change the

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[43] *See, e.g.*, Pub. L. No. 106-387, § 1(a), § 1002, 114 Stat. 1549, 1549A-72 ("Consistent with the rights of the United States under the World Trade Organization, injurious dumping is to be condemned and actionable subsidies which cause injury to domestic industries must be effectively neutralized."); *id.* ("United States trade laws should be strengthened to see that the remedial purpose of those laws is achieved."); *id.* ("Where dumping or subsidization continues, domestic producers will be reluctant to reinvest or rehire and may be unable to maintain pension and health care benefits that conditions of fair trade would permit. Similarly, small businesses and American farmers and ranchers may be unable to pay down accumulated debt, to obtain working capital, or to otherwise remain viable."); 106 Cong. Rec. S.497-01 (daily ed. Jan. 19, 1999) (Statement of Senator DeWine) ("As my colleagues know, the Tariff Act of 1930 gives the President the authority to impose duties and fines on imports that are being dumped in U.S. markets, or subsidized by foreign governments. Our bill would take the 1930 Act one step further. Currently, revenues raised through import duties and fines go to the U.S. Treasury. Under our bill, duties and fines would be transferred to injured U.S. companies as compensation for damages caused by dumping or subsidization. We believe this extra step is necessary. Current law simply has not been strong enough to deter unfair trading practices.").

[44] *See* United States Government Accountability Office, *Report to Congressional Requesters: International Trade: Issues and Effects of Implementing the Continued Dumping and Subsidy Offset Act*, 40-41, 70, 102-04 (2005); Jeanne J. Grimmet, *Congressional Research Service Report for Congress: The Continued Dumping and Subsidy Offset Act* 21-22 (2005); Congressional Budget Office, *Economic Analysis of The Continued Dumping and Subsidy Offset Act of 2000* 5-8 (2004). *See generally W. Lynn Creamery*, 512 U.S. at 210-11 (Scalia, J. concurring) (noting that giving a subsidy would have the same effect as raising the tariff rate); Sykes, *supra*, at 7-10;

competitive environment for importers *of goods* who are subject to antidumping and countervailing duty orders and to use those laws to accomplish this end. *See, e.g., Huaiyin Foreign Trade Council v. United States*, 322 F.3d 1369, 1380 (Fed. Cir. 2003) (the Byrd Amendment's purpose is to "level[ ] the competitive conditions through negation of the unfair advantage gained by the price difference of imported products."). This is especially evidenced by the fact that Byrd Distributions are allocated from special accounts within the U.S. Treasury to parties who supported the antidumping or countervailing duty order. 19 U.S.C. § 1675c(e), 19 C.F.R. § 159.64.[45] Under this arrangement, it is apparent that Customs merely holds such duties for affected domestic producers. *Cf. Core Concepts of Fla., Inc. v. United States*, 327 F.3d 1331, 1338 (Fed. Cir. 2003) (money spent from special accounts does not constitute an appropriation); *United States v. Aiello*, 912 F.2d 4, 7 (2d Cir. 1990) ("We do not believe that

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Christopher R. Drahozal, *On Tariffs v. Subsidies in Interstate Trade: A Legal and Economic Analysis*, 74 Wash. U. L. Q. 1127, 1144-50 (1996); William M. Corden, *Trade Policy and Economic Welfare* 12 (1974) ("The *production* or *protection effect* [of a tariff] would be exactly the same as in the case of a subsidy . . . ."); *but cf.* Bo Sodersten and Geoffrey Reed, *International Economics* 212 (3rd ed. 1994) (effect of a tariff of a foreign producers will be greater than a subsidy). In essence, subsidies have the effect of raising the rate of duty on importers.

[45] The fact that unclaimed funds are remitted to the general U.S. Treasury is of no moment. The Byrd Amendment is outcome determinative for any such revenues generated for the U.S. government, and any funds are deposited into the U.S. Treasury only after Customs applies the Byrd Amendment to duty orders.

funds collected by the United States pursuant to a judgment of the District Court are insulated by the Appropriations Clause from return to the rightful owner in the event of a reversal of that judgment simply because the funds are held in the Treasury during the course of the litigation."); *Varney v. Warehime*, 147 F.2d 238, 245 (6th Cir. 1945) (where the government merely holds such monies for others, the expenditure of those funds is not an appropriation); *compare J.W. Hampton & Co.*, 276 U.S. at 412 ("So long as the motive of Congress and the effect of its [protective tariff scheme] are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subjects of taxes can not invalidate Congressional action.") *with Butler*, 297 U.S. at 61 ("'[a] tax . . . as [the term is] used in the Constitution, signifies an exaction for the support of the Government" and, therefore, "has not been thought to [authorize] the expropriation of money from one group for the benefit of another."). As such, it is clear that the Byrd Amendment is part-and-parcel of legislation intended to effectively neutralize the adverse effects of dumped and subsidized goods. *See Huaiyin Foreign Trade Council*, 322 F.3d at 1380 ("The duties now bear less resemblance to a fine payable to the government, and look more like compensation to victims of anticompetitive behavior."); *See* 106 Cong. Rec. S. 497-01 (daily ed. Jan. 19, 1999) (Statement of Senator DeWine) ("It's time we impose a heavier price on dumping and subsidization. . . . Under our bill, foreign steel producers would get a double hit from dumping: they would have to pay a duty, and in turn, see that duty go directly to aid U.S. steel producers.").

In sum, essentially, the Byrd Amendment converts what was just a tariff into a broader compensatory regime. Certainly, this change in the nature of the remedies available under the trade laws is something Section 408 is meant to foreclose as to Canadian and Mexican goods where Congress has not explicitly stated an intent to change the statutory remedies as to Canada and Mexico.

B) The Byrd Amendment Does Not Supersede Section 408

Defendant and Defendant-Intervenor next argue that, even if Section 408 is applicable, the Byrd Amendment supersedes Section 408. As Defendant-Intervenor points to Section 102(a) of the NAFTA Implementation Act, codified at 19 U.S.C. § 3312(a), which requires that "no provision of the *Agreement*, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect." (Emphasis added). As discussed above, however, Section 408 is a provision of statutory law, not a provision of NAFTA. Therefore, 19 U.S.C. § 3312(a) is not implicated here. Moreover, even if Section 102(a) were implicated, there is no inconsistency between the Byrd Amendment and Section 408. On the contrary, the two are easily reconciled by limiting the reach of the Byrd Amendment to non-NAFTA goods. *Cf. Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 125 S. Ct. 2169, 2182, 162 L. Ed. 2d 97 (2005). Therefore, Defendant-Intervenors' argument must fail.

Alternatively, during oral argument, Defendant argued for the first time that the Byrd Amendment

by itself satisfied the "magic words" requirement of Section 408. Relying on Justice Scalia's concurrence in *Lockhart v. United States*, 126 S. Ct. 699, 702, 163 L. Ed. 2d 557 (2005), and the Supreme Court's opinions in *Marcello v. Bonds*, 349 U.S. 302, 310, 75 S. Ct. 757, 99 L. Ed. 1107 (1955), and *Great N. R. Co. v. United States*, 208 U.S. 452, 465, 28 S. Ct. 313, 52 L. Ed. 567 (1908), Defendant argues that no "magical password" is required for Congress to supersede the requirements of Section 408. Therefore, Defendant claims, the Byrd Amendment satisfies the requirements of Section 408.

Although the Defendant may be correct that "no magical password" is necessarily required, this precedent does not mean that Section 408 is a dead-letter. Rather, the Court has held that provisions, such as Section 408, may be superseded "expressly or by necessary implication in a subsequent enactment." *Great Northern R. Co. v. United States*, 208 U.S. 452, 465, 28 S. Ct. 313, 52 L. Ed. 567 (1908). *Accord Warden v. Marrero*, 417 U.S. 653, 659-660 n.10, 94 S. Ct. 2532, 41 L. Ed. 2d 383 (1974) (express statement provisions may be superceded by "fair implication"). Here, there exists no "express" statement nor is there any "necessary implication," or even "fair" implication, that Congress intended to trump Section 408 when enacting the Byrd Amendment. Therefore, to read the general language of the Byrd Amendment as satisfying the requirements of Section 408 would essentially render Section 408 a dead-letter. The cases upon which Defendant relies do not support this conclusion.

Nor does the court find Justice Scalia's constitutional arguments availing (as applied here).

According to Justice Scalia, provisions such as Section 408 tend to "entrench" legislation, *i.e.*, make it more difficult for subsequent legislatures to repeal a law. *Lockhart*, 126 S.Ct. at 703; cf. Eric A. Posner and Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L.J. 1665, 1697-99 (2002). Because "'one legislature cannot abridge the powers of a succeeding legislature.'" *Lockhart*, 126 S. Ct. at 703 (quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135, 3 L. Ed. 162 (1810)), such legislation should be read narrowly - if considered at all.[46] Although these premises or principles are unquestionably true, *see, e.g., United States v. Winstar Corp.*, 518 U.S. 839, 872, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996), such principles are not implicated here. To the contrary, Section 408 may be repealed, or satisfied, by a simple majority in both houses (assuming no presidential veto). Therefore, Section 408 is not unduly restrictive of Congressional prerogatives.

All Section 408 purports to do is "function as background canon[] of interpretation of which Congress is presumptively aware." *Lockhart*, 126 S.

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[46] Justice Scalia concluded his dissent with the observation that, "in any event, I think it does no favor to the Members of Congress, and to those who assist in drafting their legislation, to keep secret the fact that such express-reference provisions are ineffective." *Lockhart*, 126 S. Ct. at 704. The court notes that Justice Scalia's theory, depending on how construed, could have staggering effects. Numerous pieces of legislation purport to define rules of interpretation such as the: Dictionary Act, 1 U.S.C. § 1; Defense of Marriage Act, 1 U.S.C. § 7; General Rules of Interpretation of the Harmonized Tariff Schedule of the United States, 19 U.S.C. § 1202; Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-3(b); National Emergencies Act, 50 U.S.C. § 1621.

Ct. at 703. Indeed, provisions such as Section 408 are no more entrenching than canons of statutory interpretation under which courts require Congress to conform. *See, e.g., Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 814-15, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1994) (Scalia, J. dissenting) (noting that *Charming Betsy* canon compelled a certain interpretation of a federal statute); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 260, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991) (Scalia, J. concurring) (clear statement rules, such as the presumption against extraterritoriality, overcome *Chevron* deference).

Furthermore, as noted by Justice Scalia, provisions such as Section 408 may "add little or nothing to . . . already-powerful" canons of interpretation. *Lockhart*, 126 S. Ct. at 703-04. In this case, for example, Section 408 exists to protect the United States' obligations under NAFTA. Indeed, powerful canons do exist to protect such interests. *See, e.g., Weinberger v. Rossi*, 456 U.S. 25, 32, 102 S. Ct. 1510, 71 L. Ed. 2d 715 (1982); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22, 83 S. Ct. 671, 9 L. Ed. 2d 547 (1963) (overturning the NLRB's construction of a statute because Congress did not clearly state that it intended to violate the law of nations); *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 142, 80 S. Ct. 543, 4 L. Ed. 2d 584 (1960) (Black, J. dissenting) ("Great nations, like great men, should keep their word."); *Roeder v. Islamic Republic of Iran*, 357 U.S. App. D.C. 107, 333 F.3d 228, 237-38 (D.C. Cir. 2003) (holding that Congress must speak with a clear statement if it intends to abrogate an international agreement). Consequently, because Section 408 is

supported by, and plays a complementary role with, canons of interpretation, the logic Justice Scalia advances does not preclude application of Section 408 here.

Accordingly, Defendant's argument must be rejected.

C) Nature of Congressional Power employed is not relevant

As a last resort, Defendant and Defendant-Intervenors argue that Congress has broad authority under the Spending Clause, U.S. Const. art. I, § 8, which this court would trample were the court to adopt Plaintiffs' construction of Section 408. *See, e.g.,* Def.'s Reply at 42; Def.-Int.'s Reply at 72 (arguing that the Byrd Amendment "addresses the disbursement of U.S. Treasury funds that have become property of the United States Government *subsequent* to the imposition of AD/CVD duties . . . . Once the funds become property of the U.S. Government, the Congress has the constitutional power to dispose of the monies under the Spending Clause." (emphasis in original)). This case, however, has *nothing* to do with Congress' spending power. What is at issue is whether the Commissioner is properly distributing monies derived from duty orders on goods from Canada or Mexico, *i.e.*, whether the Commissioner is properly exercising her statutory authority where the Byrd Amendment does not specify that it applies to goods from a NAFTA country.

The Byrd Amendment, when read correctly, in light of Section 408, states that distributions should be made from duties collected pursuant to

antidumping and countervailing duty orders except for duty orders on goods from Canada and Mexico. Accordingly, Congress has not authorized the Commissioner to distribute duties collected on goods from Canada and Mexico; in fact, by failing to specify that the Byrd Amendment applies to Canada and Mexico, Congress has exercised its authority to preclude such distributions.

Assuming *arguendo* that the Byrd Amendment is even an appropriations measure, because the Constitution grants Congress the plenary and exclusive authority to expend monies from the federal treasury, see U.S. Const. art. I, § 7, *a fortiori*, the U.S. Constitution does not grant the *executive branch* authority to expend monies not appropriated by Congress, *see, e.g., Office of Pers. Mgmt v. Richmond*, 496 U.S. 414, 424, 110 S. Ct. 2465, 110 L. Ed. 2d 387 (1990) ("Our cases underscore the straightforward and explicit command of the Appropriations Clause. 'It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'") (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321, 57 S. Ct. 764, 81 L. Ed. 1122, 1937-1 C.B. 317 (1937)). Therefore, because the Commissioner has no authority either under an Act of Congress or under the Constitution to make the distributions at issue here, her actions in distributing such funds are *ultra vires* and therefore unlawful. Furthermore, the language of Section 408 does not speak to the type of Congressional authority invoked, but to the laws to which amendments are to be made.

The parties also dispute the level of deference owed to Customs' interpretation of Section 408.

Because there is no hint of ambiguity in Section 408, the plain language of Section 408 must govern, any deference owed Customs notwithstanding. *See Chevron U. S. A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *see also Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600, 124 S. Ct. 1236, 157 L. Ed. 2d 1094 (2004) ("Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent."); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002) ("In the context of an unambiguous statute, we need not contemplate deferring to the agency's interpretation."); *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 13 F.3d 398, 403 (Fed. Cir. 1994) ("Because we believe the antidumping statute is not silent on the question . . . the reasonableness or fairness of Commerce's interpretation of the Antidumping Act is irrelevant.).

Therefore, based on Congress' plain language in Section 408, Customs is not authorized to apply the Byrd Amendment to goods from Canada or Mexico.

VI. REMEDY

The parties also disagree on the appropriate remedy. Plaintiffs seek both prospective injunctive relief, and disgorgement of all past distributions as

permitted by Customs' regulations, 19 C.F.R. § 159.64(b)(3). Defendant argues that 19 C.F.R. § 159.64(b)(3) only permits Customs to disgorge any "overpayments," and that, because Plaintiffs seek disgorgement of the entirety of past distributions, Plaintiffs do not seek disgorgement of an "overpayment." Def.'s Reply at 50. Defendant further asserts that Plaintiffs have slept on their rights for six years, *i.e.*, from the time the Byrd Amendment was passed until the filing of the Complaints rendering (at least retrospective) relief inappropriate. Defendant also avers, without elaboration, that "the Court should exercise its discretion to limit any remedy to prospective relief." Def.'s Reply at 50 (citing *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 506-07 (9th Cir. 1997); *Or. Nat'l Res. Council v. Harrell*, 52 F.3d 1499, 1508 (9th Cir. 1995)).

Because the parties have devoted little energy to briefing the question of remedy, and because the dismissal of Canada's claims may impact the parties' briefing on this question, the court hereby orders further briefing with respect to remedy.[47]

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[47] In considering the appropriate remedy, the court asks the parties to bear in mind the following considerations: (1) The court has found unlawful Byrd Amendment distributions of antidumping and countervailing duties on goods from a NAFTA country; (2) disgorgement of monies for which Canada has already retaliated may unjustly enrich Canada at the expense of the United States; (3) the public interest in seeing money properly deposited in the United States' Treasury, and (4) the lack of authority the Commissioner has here exercised in distributing such funds.

CONCLUSION AND ORDER

For the foregoing reasons, Defendant's motion to dismiss the Government of Canada is granted; the Defendant's motion to dismiss with respect to the Canadian Producers is denied.

The court hereby ORDERS that the parties shall meet and confer concerning an appropriate remedy; the parties shall submit any jointly proposed remedy to the court no later than May 8, 2006; if the parties do not agree on a proposed remedy, the parties shall by said date submit recommendations and arguments to the court concerning the proper remedy and the scope of such remedy.

IT SO ORDERED.

/s/

Donald C. Pogue, Judge

Dated: April 7, 2006

New York, NY

APPENDIX C

UNITED STATES COURT OF INTERNATIONAL TRADE

Slip Op. 06-104
Consol. Ct. No. 05-00324

CANADIAN LUMBER TRADE ALLIANCE et al.,	)
Plaintiffs,	)
v.	)
THE UNITED STATES et al.,	)
Defendants.	)

July 14, 2006, Decided

[**OPINION BY**: Donald C. Pogue]

OPINION

In *Canadian Lumber Trade Alliance v. United States*, 30 CIT__, 425 F. Supp. 2d 1321 (2006) this court found that certain producers/exporters of goods from Canada to the United States, Plaintiffs in this proceeding, had standing and a cause of action to challenge the application of the Continued Dumping and Subsidy Offset Act of 2000 (commonly known,

and referred to herein, as the "Byrd Amendment"), and that Plaintiffs' actions were not barred by the political question doctrine. The court further found that the Defendant Bureau of Customs and Border Protection ("Customs") was improperly applying the Byrd Amendment to goods from Canada and Mexico ("NAFTA parties") in violation of section 408 of the North American Free Trade Agreement Act ("NAFTA Implementation Act").[1] At the end of that decision, and in light of the court's holdings, the court ordered the parties to meet and confer with respect to the appropriate remedy/remedies; if the parties failed to agree on remedies, the court further ordered the parties to submit recommendations as to the appropriate remedy and scope of such remedy.

The parties have now reported to the court that they were unable to reach agreement on remedies and have accordingly submitted their recommendations. Upon consideration of the parties' comments, and for the reasons set forth below, the court awards both declaratory and injunctive relief.

DISCUSSION

The court's authority to grant relief is defined by 28 U.S.C. §§ 1585 and 2643. Section 2643 states, in relevant part,

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[1] Familiarity with the court's prior opinion is presumed.

> Except as provided in paragraphs (2), (3), (4), and (5) of this subsection, the Court of International Trade may, in addition to the orders specified in subsections (a) and (b) of this section, order any other form of relief that is appropriate in a civil action, including, but not limited to, declaratory judgments, orders of remand, injunctions, and writs of mandamus and prohibition.

28 U.S.C. § 2643(c)(1). The authority provided by Section 2643 complements 28 U.S.C. § 1585 which specifies that "[t]he Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." The legislative history of these provisions supports a broad reading of the court's remedial authority. *See Borlem S.A.-Empreedimentos Industriais v. United States*, 913 F.2d 933, 937 (Fed. Cir. 1990) ("[T]he legislative history of 28 U.S.C. § 1585 (1980) provides the Court of International Trade 'with all the necessary remedial powers in law and equity possessed by other federal courts established under Article III of the Constitution.'") (footnote omitted) (quoting *Rhone Poulenc, Inc. v. United States*, 880 F.2d 401, 402 (Fed. Cir. 1989)); *see also Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1312 (Fed. Cir. 2004); *United States v. Hanover Ins. Co.*, 82 F.3d 1052, 1054 (Fed. Cir. 1996) ("Like district courts, the Court of International Trade has the inherent power to determine the effect of its judgments and issue injunctions to protect against attempts to attack or evade those judgments." (citations omitted)).

Plaintiffs here have asked the court to use its authority to grant three types of relief: (1) a declaratory judgment; (2) a permanent injunction enjoining all future Byrd distributions collected on Plaintiffs' goods; and (3) disgorgement of prior past distributions. Defendant and Defendant-Intervenors contest this relief, albeit in varying degrees, and with sometimes similar and sometimes different concerns. The court will address in turn each aspect of the requested relief.

(1) Declaratory Relief

Pursuant to the Declaratory Judgment Act,

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986 [26 U.S.C. § 7428], a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930 [19 U.S.C. § 1516a(f)(10)]),[2] as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking

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[2] No party contends that this case involves an antidumping or countervailing duty proceeding within the meaning of Section 2201(a).

> such declaration, *whether or not further relief is or could be sought.* Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a) (emphasis added). *See also* USCIT R. 57; 28 U.S.C. § 2202.

The Supreme Court has explained that "[w]hile the courts should not be reluctant" to grant relief in appropriate cases, *Public Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 243, 73 S. Ct. 236, 97 L. Ed. 291 (1952), the declaratory judgment statute "is an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant," *id.* at 241. *See also Green v. Mansour*, 474 U.S. 64, 72, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985); *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995) ("By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court's quiver; it created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants."). Accordingly, "declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power." *Wycoff*, 344 U.S. at 243. *See also Green*, 474 U.S. at 72 (noting the court's authority is bound in "equitable considerations"); *Samuels v. Mackell*, 401 U.S. 66, 70-73, 91 S. Ct. 764, 27 L. Ed. 2d 688 (1971).

In its prior decision, this court determined that there exists a "case of actual controversy" between the parties, that is within the court's jurisdiction.

The court also concluded that Customs is violating the Plaintiffs' "legal rights." *See Canadian Lumber Trade Alliance v. United States*, 30 CIT __, 425 F. Supp. 2d 1321, 1373 (2006). Moreover, the court found that future injury to Plaintiffs from Defendant's conduct is certain. *Id.* at 1348-49; *cf. Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 71 n.15, 98 S. Ct. 2620, 57 L. Ed. 2d 595 (1978) ("While the Declaratory Judgment Act does not expand our jurisdiction, it expands the scope of available remedies. Here it allows individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained.").

Although neither Defendant or Defendant-Intervenors consent to declaratory relief,[3] neither offers any justification for why it should not issue. Because Plaintiffs have satisfied the requirements for declaratory relief, and defendants have failed to show good cause for why it should not issue, the court finds declaratory relief appropriate. Therefore, in conformity with the requirements of USCIT R. 57, and as requested by Plaintiffs, the court grants the Plaintiffs declaratory relief as set forth in the judgment issued concurrent with this opinion.

(2) Injunctive Relief

Next, Plaintiffs seek a *permanent* injunction barring future distributions. Although Defendant

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[3] At oral argument, the government appeared to soften its position on this issue, though the court could not divine the government's precise intent.

concedes that an injunction should issue, it questions whether Plaintiffs have satisfied parts of the test for an injunction; Defendant-Intervenors contend that an injunction should not issue. The court agrees with Plaintiffs and Defendant that an injunction should issue.

To be sure, "[a]n injunctive order is an extraordinary writ, enforceable by the power of contempt." *Gunn v. Univ. Comm. to End the War in Viet Nam*, 399 U.S. 383, 389, 90 S. Ct. 2013, 26 L. Ed. 2d 684 (1970). Because of the force behind an injunction, and because injunctive relief is an exception to the rule that "courts have no general supervising power over the proceedings and action of the various administrative departments of the government," *Keim v. United States*, 177 U.S. 290, 292, 20 S. Ct. 574, 44 L. Ed. 774, 35 Ct. Cl. 628 (1900), permanent injunctions do not "issue[] as of course," *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311, 102 S. Ct. 1798, 72 L. Ed. 2d 91 (1982) (quoting *Harrisonville v. W. S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 337-338, 53 S. Ct. 602, 77 L. Ed. 1208 (1933)). Rather, "the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and [] such discretion must be exercised consistent with traditional principles of equity . . . ." *eBay Inc. v. MercExchange, L.L.C.*, ___ U.S. ___, 126 S. Ct. 1837, 1841, 164 L. Ed. 2d 641 (2006).

As the Supreme Court recently stated in eBay:

> According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test

> before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion.

Id. at 1839 (citations omitted). All parties agree, as they must, that the "four-factor test" is a balancing test. *See, e.g., Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542, 107 S. Ct. 1396, 94 L. Ed. 2d 542 & 546 n.12 (1987). However, the parties, to some degree, dispute elements of each factor. The court will address each in turn.

(i) Irreparable Harm & Lack of Alternative Remedies[4]

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[4] Although stated as two separate prongs by the Court in *eBay*, whether something is "irreparable" requires, to a certain extent, a lack of alternative remedies. Moreover, the *eBay* Court based the test on "well-established principles of equity." *Id.* at 1839. Under traditional principles of equity, "irreparable injury is not an independent requirement for obtaining a permanent injunction; it is only one basis for showing the inadequacy of a legal remedy." 11A Arthur Wright et al., *Federal Practice and Procedure* § 2944 (1995) (at page

Here, by providing cash to Plaintiffs' domestic competitors, Customs alters the balance of trade preserved by the NAFTA Implementation Act and enhances the competitive position of Plaintiffs' domestic competitors, resulting in a loss of trade over time. *Canadian Lumber Trade Alliance*, 30 CIT at ___, 344 F. Supp. 2d at 1345-49. Such a harm is cognizable. *See, e.g., Parker v. Winnipiseogee Lake Cotton & Woolen Co.*, 67 U.S. (2 Black) 545, 551, 17 L. Ed. 333 (1863) (noting that a "recurring grievance" which causes "the loss of trade" counsels in favor of an equitable remedy). The only question is whether the harm to Plaintiffs is more than "merely trifling." *Consol. Canal Co. v. Mesa Canal Co.*, 177 U.S. 296, 302, 20 S. Ct. 628, 44 L. Ed. 777 (1900) (citing *Parker*, 67 U.S. (2 Black) at 552).

In *Canadian Lumber Trade Alliance*, 30 CIT at ___, 425 F. Supp. 2d at 1345-49, this court held that although the extent of Plaintiffs' injury may be disputed, there was no question Plaintiffs had sufficiently demonstrated injury to satisfy the very

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94). *See also* Dan B. Dobbs, *Law of Remedies* 50 (2d ed. 1993); Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 Harv. L. Rev. 687 (1990). As Judge Friendly explained,

> A plaintiff asking [for] an injunction because of the defendant's violation of a statute is not required to show that otherwise rigor mortis will set in forthwith; all that 'irreparable injury' means in this context is that unless an injunction is granted, the plaintiff will suffer harm which cannot be repaired.

Studebaker Corp. v. Gittlin, 360 F.2d 692, 698 (2d Cir. 1966).

"generous test" for standing. Similarly here, the court is again cautious to speculate on the extent of Plaintiffs' injury. Nonetheless, upon consideration of the testimony adduced at trial and various government reports entered into evidence, together with Customs' failure to publish notice of an intent to comply with the court's order, the court concludes that Plaintiffs have sufficiently shown that their injury is more than "merely trifling." The record demonstrates that Customs has used the Byrd Amendment to provide significant support to Plaintiffs' domestic competitors in violation of section 408. The court must conclude that, absent an order by this court, this violation will continue. *Id.*; *cf. United States v. W. T. Grant Co.*, 345 U.S. 629, 633, 73 S. Ct. 894, 97 L. Ed. 1303 (1953) ("The purpose of an injunction is to prevent future violations, and, of course, it can be utilized even without a showing of past wrongs." (citing *Swift & Co. v. United States*, 276 U.S. 311, 326, 48 S. Ct. 311, 72 L. Ed. 587 (1928)).

The court also finds that this harm is "irreparable." Given that the United States, and the agencies thereof, are cloaked in sovereign immunity, a party may only sue the United States for monetary damages when Congress has affirmatively waived the government's immunity. *See, e.g., Lane v. Pena*, 518 U.S. 187, 192, 116 S. Ct. 2092, 135 L. Ed. 2d 486 (1996); *FDIC v. Meyer*, 510 U.S. 471, 475, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994). Here, Plaintiffs have raised their claims under the Administrative Procedure Act ("APA"). Although the APA generally waives the United States' immunity from suit, it does not permit claims for monetary damages. *See* 5

U.S.C. § 702; *Lane*, 518 U.S. at 196. Nor is there any other basis for Plaintiffs to seek relief. Accordingly, the harm is irreparable. *See, e.g., Ohio Oil Co. v. Conway*, 279 U.S. 813, 815, 49 S. Ct. 256, 73 L. Ed. 972 (1929); *Kan. Health Care Ass'n, Inc. v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994) (a state's Eleventh Amendment immunity rendered harm irreparable); *Temple Univ. v. White*, 941 F.2d 201, 215 (3rd Cir. 1991); *Zenith Radio Corp. v. United States*, 710 F.2d 806, 811 (Fed. Cir. 1983); *Brendsel v. Office of Fed. Hous. Enter. Oversight*, 339 F. Supp. 2d 52, 66 (D.D.C. 2004); *cf. Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 545, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987) (noting that a harm is irreparable when money damages cannot generally compensate for it).

Despite the apparent lack of alternative remedies, Defendant argues that the court could continue to allow Customs to make distributions which Customs then *may* (with unreviewable discretion according to Customs) decide to recoup from the recipients (if it so elects), pursuant to Customs' own regulation. *See* 19 C.F.R. § 159.64(3). This disgorgement, Customs claims, is an alternative remedy making the harm to Plaintiffs reparable.

Defendant's argument is entirely unpersuasive. First, to the extent Customs does recoup erroneously distributed monies, this "alternative" remedy is little different than an injunction -- Customs would be giving out money only to immediately recollect it.[5]

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[5] Customs does not appear to fully recognize that the issue here regards the propriety of a *permanent injunction*, rather

Indeed, the only difference between Defendant's alternative and an injunction is that an injunction will not require the administrative cost and inconvenience of Customs' proposal.

Customs correctly notes that disgorgement is an equitable remedy. *See Tull v. United States*, 481 U.S. 412, 424, 107 S. Ct. 1831, 95 L. Ed. 2d 365 (1987); *SEC v. Cavanagh*, 445 F.3d 105, 119 (2d Cir. 2006); *United States v. Philip Morris, Inc.*, 273 F. Supp. 2d 3, 8-9 (D.D.C. 2002). Courts must, of course, grant legal remedies if they are available and adequate. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 292, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997) (O'Connor J., concurring); *see also Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 509, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959) ("in the federal courts equity has always acted only when legal remedies were inadequate"). But where, as here, there is no available legal remedy, the court has broad discretion to choose the *appropriate* equitable remedy. *See, e.g.*, Dan B. Dobbs, *Law of Remedies* 82 (2d ed. 1993). As Defendant's alternative remedy is more burdensome than an injunction, the court does not find that disgorgement is an alternative. *See*

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than a *preliminary injunction*. The court considers a *permanent injunction*, after having *already* concluded that the Defendant has committed an unlawful act; therefore, when the distribution is made, there is no issue awaiting judicial resolution regarding the unlawfulness of the distribution. *See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund*, 527 U.S. 308, 314-15, 119 S. Ct. 1961, 144 L. Ed. 2d 319 (1999). While a party certainly may appeal this court's decision, the permanent injunction inquiry operates under the assumption that the court's conclusions are correct.

Beacon Theatres, 359 U.S. at 507 ("Inadequacy of remedy and irreparable harm are practical terms, however."); *Boyce's Ex'rs v. Grundy*, 28 U.S. (3 Pet.) 210, 214, 7 L. Ed. 655 (1830) ("It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.").

But even more fundamentally, Customs has not stated that it *must* recoup any erroneously distributed monies; rather, it claims, any recoupment will depend on its unreviewable discretion. Just as the possibility that a defendant may voluntarily cease its illegal conduct does not moot the need for an injunction, the fact that the Defendant *may* later take voluntary action to "make things right" does not negate the need for an injunction either. *Cf. Allee v. Medrano*, 416 U.S. 802, 811-12, 94 S. Ct. 2191, 40 L. Ed. 2d 566 (1974) ("It is settled that an action for an injunction does not become moot merely because the conduct complained of has terminated, if there is a possibility of recurrence, since otherwise the defendants 'would be free to return to [their] old ways.'") (quoting *Gray v. Sanders*, 372 U.S. 368, 376, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963)); *Goshen Mfg. Co. v. Hubert A. Myers Mfg. Co.*, 242 U.S. 202, 208, 37 S. Ct. 105, 61 L. Ed. 248, 1916 Dec. Comm'r Pat. 292 (1916) (enjoining a patent infringement was proper because "further infringement was in effect threatened and could be reasonably apprehended."). Indeed, the entire purpose of an injunction is to take away defendant's discretion not to obey the law. *Cf. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund*, 527 U.S.

308, 315, 119 S. Ct. 1961, 144 L. Ed. 2d 319 (1999) ("The final injunction establishes that the defendant *should not have been engaging in the conduct that was enjoined.*" (emphasis in original)). To wit, a cognizable alternative remedy must rest on more than the whim or discretion of a defendant.

Therefore, the court finds both that, in the absence of relief here, the Plaintiffs will suffer irreparable harm and that there are no available legal remedies for that harm.

(ii) Balance of Hardships

Having established that the Plaintiffs will be irreparably harmed in the absence of an injunction, the court must consider the effect on other parties. Defendant, to its credit, has acknowledged it will not be harmed by an injunction. Defendant-Intervenors, however, claim that they will be harmed because they will not get Byrd Distributions. Given the purpose of the Byrd Amendment, i.e., to strengthen U.S. industry, Defendant-Intervenors claim that the balance of hardships tips in their favor. The court disagrees.

In the context of a permanent injunction, because a defendant "will always suffer a hardship if he must comply with his contract when it has become expensive or if he must cease operating a factory that earns profits but also pollutes" only "hardship to the defendant [that] is not an inseparable part of the plaintiff's right" is cognizable. Dan B. Dobbs, *Law of Remedies* 80 (2d ed. 1993); *cf. Am. Hosp. Supply Corp. v. Hosp. Prods., Ltd.*, 780 F.2d 589, 596-97 (7th Cir. 1985) (Posner, J.). Here Defendant-Intervenors' claimed injury is entirely coextensive with Plaintiffs'

rights. Accordingly, Defendant-Intervenors' claim is not separable from Plaintiffs' right. Therefore, Defendant-Intervenors' argument must be rejected. Because Plaintiffs have demonstrated harm to their interests, and opposing parties do not identify any cognizable harm to themselves, this factor tips in Plaintiffs' favor.

(iii) Public Interest

Last, the court must consider whether the public interest favors an injunction. In balancing the public interest, courts have traditionally looked to the underlying statutory purposes at issue. *See, e.g., Amoco Production Co. v. Gambell*, 480 U.S. 531, 544-46, 107 S. Ct. 1396, 94 L. Ed. 2d 542 (1987); *TVA v. Hill*, 437 U.S. 153, 194, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978); *Hecht Co. v. Bowles*, 321 U.S. 321, 331, 64 S. Ct. 587, 88 L. Ed. 754 (1944). Here, as expressed by the court in its discussion of prudential standing, section 408 of the NAFTA Implementation Act limits the applicability of any subsequent amendment to Title VII of the Tariff Act of 1930 with respect to how those laws relate to the importation of goods from NAFTA parties (in the absence of an express statement by Congress to the contrary). *See Canadian Lumber Trade Alliance*, 30 CIT at ___, 425 F. Supp. 2d at 1373. As such, the language of section 408 indicates that Congress meant to place the interests of respecting NAFTA above the salutary purposes of future amendments to Title VII of the Tariff Act of 1930 (absent an express statement from Congress). Any other conclusion would render section 408 nugatory. *Id.*

Defendant-Intervenors correctly note that the court may consider public interest factors outside those implicated by the statutory provisions. Defendant-Intervenors point to the need to stop dumping and subsidization as counseling in favor of denying an injunction. This interest, however, as explained above, was resolved by Congress against the Defendant-Intervenors through its adoption of section 408. *Cf. Hill*, 437 U.S. at 194 (finding that because it determined that Congress afforded endangered species "the highest priorities," the balance of interests favored injunctive relief); *Hecht*, 321 U.S. at 331. Moreover, Defendant-Intervenors neglect to mention or consider other public interests at stake namely, protecting the public treasury or recognizing that certain U.S. exports to Canada face retaliatory measures commensurate with the outlay of Byrd Distributions. Clearly then, this argument must be rejected, and the court concludes that the public interest in the enforcement of the law weighs in favor of issuance of an injunction.

(iv) Balancing the Prongs

As all prongs lean in the Plaintiffs' favor, the court finds injunctive relief appropriate. In doing so, the court acknowledges that a large balance of the unlawful Byrd distributions remain to be completed. Nonetheless, because all the other factors weigh decisively in Plaintiffs' favor, even were the court to have found that Plaintiffs failed to demonstrate substantial economic harm, nonetheless the remaining harm to Plaintiffs' rights could not be remedied without an injunction, and the balance of equities would still warrant injunctive relief here. Therefore, the court would still find that an

injunction should issue. Accordingly, in conformity with USCIT R. 65(d), the court grants Plaintiffs injunctive relief as set forth in the judgment issued concurrent with this opinion.

(3) Disgorgement

Last, Plaintiffs request an order directing Customs to disgorge monies that Customs has improperly disbursed in Fiscal Years 2004 and 2005. *See* 19 C.F.R. § 159.64(b)(3). If declaratory relief is an "arrow in the court's quiver," and injunctive relief is an "extraordinary remedy," disgorgement is a landmine. *Cf. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 314-15, 329, 119 S. Ct. 1961, 144 L. Ed. 2d 319 (1999) (referring to a *Mareva* injunction as the "nuclear weapon of law").

When the government grants or distributes money to parties, those parties have some right to rely on that money they receive. *Cf. Parsons v. United States*, 670 F.2d 164, 166, 229 Ct. Cl. 335 (Ct. Cl. 1982) ("It is well established that there is a presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with law and governing regulations. . . ."). If there were the constant threat of disgorgement, recipients might be loath to expend money for the purpose for which it was given (fearing that they could not repay the money in the event of a court order). This, in turn, would frustrate Congressional intent in granting money.

To be sure, as demonstrated here, there are times when agencies violate congressional intent in granting money. Nevertheless, where recipients do

not bring an action challenging the distribution of such money at the time the money is initially granted, public policy ordinarily requires that recipients should be allowed to expend such money without fear that it will later be recollected until the distribution of the money is called into question.[6] *See Laskowski v. Spellings*, 443 F.3d 930, 936 (7th Cir. 2006); *cf. EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 17 (2d Cir. 1981) (discussing the principles behind the *de facto* officer doctrine). In this case, the Plaintiffs filed their complaints in April 2005. Therefore, recipients were not placed on notice until that time that the money they received could be recouped. Consequently, the interests of equity would not be served by ordering Customs to disgorge any of the money for the period prior to the filing of the complaint.

The court further finds that equity would not be served by ordering Customs to disgorge money distributed after recipients were placed on notice of this action. Customs correctly notes that the administrative costs of recoupment are high. Moreover, in light of the other relief the court grants here today, and because the money already distributed represents a fraction of what is being held for distribution, the interest in recouping distributions already made does not warrant the high administrative costs of a court ordered recoupment.

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[6] This applies, of course, only when the recipient's conduct is innocent.

Accordingly, the court denies Plaintiffs' request for an order directing Customs to disgorge any funds already distributed.[7]

Dated: New York, New York

July 14, 2006

/s/ Donald C. Pogue

Judge

[7] The court does not reach the issues as to whether Customs is prohibited or allowed to seek disgorgement on its own initiative.

Slip Op. 06-104

UNITED STATES COURT OF INTERNATIONAL TRADE

CANADIAN LUMBER TRADE ALLIANCE *et al.*,	)
Plaintiffs,	)
v.	)
THE UNITED STATES *et al.*,	)
Defendants.	)

JUDGMENT

This consolidated case having been duly submitted for decision, and the Court, after due deliberation, having rendered decisions herein;

Now, in conformity with those decisions, it is hereby

ORDERED that the motion of the Government of Canada for judgment on the agency record is **denied**;

ORDERED that the motions of the Defendants and Defendant-Intervenors for judgment on the agency record as against theGovernment of Canada are **granted**;

ORDERED that the motions of the Canadian Lumber Trade Alliance, Norsk Hydro Canada, Inc., Canadian Wheat Board, Ontario Forest Industries

Association, Ontario Lumber Manufacturers Association, and the Free Trade Lumber Council for judgment on the agency record is **granted**;

ORDERED that the motions of the Defendant and Defendant-Intervenors for summary judgment as against the Canadian Lumber Trade Alliance, Norsk Hydro Canada, Inc., Canadian Wheat Board, Ontario Forest Industries Association, Ontario Lumber Manufacturers Association, and the Free Trade Lumber Council are **denied**; and it is further

ORDERED that the Government of Canada's complaint is **dismissed**; and it is further

ORDERED, ADJUDGED and DECREED that pursuant to Section 408 of the North American Free Trade Implementation Act, 19 U.S.C. § 3438, the Continued Dumping and Subsidy Offset Act of 2002, 19 U.S.C. § 3438, does not apply to antidumping and countervailing duties assessed on imports of goods from Canada or Mexico; and it is further

ORDERED, ADJUDGED and DECREED that Defendant W. Ralph Basham, Commissioner of the United States Bureau of Customs and Border Protection, his employees, officers, agents, attorneys, and successors in office are **permanently enjoined**, as of the July 14, 2006 from making any continued dumping and subsidy offsets, payments or distributions, to affected domestic producers, as defined by 19 U.S.C. § 1675c (2005), to the extent they derive from duties assessed pursuant to countervailing duty orders, antidumping duty orders, or findings under the Antidumping Act of

1921, upon softwood lumber from Canada, hard red spring wheat from Canada, and magnesium from Canada imported into the United States.

Dated: New York, New York

July 14, 2006

/s/ Donald C. Pogue

Judge

APPENDIX D

19 U.S.C. § 1675. Administrative review of determinations

(a) Periodic review of amount of duty

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(2) Determination of antidumping duties

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(B) Determination of antidumping or countervailing duties for new exporters and producers

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(iii) Posting bond or security

The administering authority shall, at the time a review under this subparagraph is initiated, direct the Customs Service to allow, at the option of the importer, the posting, until the completion of the review, of a bond or security in lieu of a cash deposit for each entry of the subject merchandise.

19 U.S.C. § 1675c. Continued dumping and subsidy offset

(a) In general

Duties assessed pursuant to a countervailing duty order, an antidumping duty order, or a finding under the Antidumping Act of 1921 shall be distributed on an annual basis under this section to the affected domestic producers for qualifying expenditures. Such distribution shall be known as the ``continued dumping and subsidy offset".

(b) Definitions

As used in this section:

(1) Affected domestic producer

The term ``affected domestic producer" means any manufacturer, producer, farmer, rancher, or worker representative (including associations of such persons) that—

(A) was a petitioner or interested party in support of the petition with respect to which an antidumping duty order, a finding under the Antidumping Act of 921, or a countervailing duty order has been entered, and

(B) remains in operation.

Companies, businesses, or persons that have ceased the production of the product covered by the order or finding or who have been acquired by a company or business that is related to a company that opposed the

investigation shall not be an affected domestic producer.

(2) Commissioner

The term ``Commissioner'' means the Commissioner of Customs.

(3) Commission

The term ``Commission'' means the United States International Trade Commission.

(4) Qualifying expenditure

The term ``qualifying expenditure'' means an expenditure incurred after the issuance of the antidumping duty finding or order or countervailing duty order in any of the following categories:

(A) Manufacturing facilities.

(B) Equipment.

(C) Research and development.

(D) Personnel training.

(E) Acquisition of technology.

(F) Health care benefits to employees paid for by the employer.

(G) Pension benefits to employees paid for by the employer.

(H) Environmental equipment, training, or technology.

(I) Acquisition of raw materials and other inputs.

(J) Working capital or other funds needed to maintain production.

(5) Related to

A company, business, or person shall be considered to be `related to" another company, business, or person if—

(A) the company, business, or person directly or indirectly controls or is controlled by the other company, business, or person,

(B) a third party directly or indirectly controls both companies, businesses, or persons,

(C) both companies, businesses, or persons directly or indirectly control a third party and there is reason to believe that the relationship causes the first company, business, or persons to act differently than a nonrelated party.

For purposes of this paragraph, a party shall be considered to directly or indirectly control another party if the party is legally or operationally in a position to exercise restraint or direction over the other party.

(c) Distribution procedures

The Commissioner shall prescribe procedures for distribution of the continued dumping or subsidies offset required by this section. Such distribution shall be made not later than 60 days after the first day of a fiscal year from duties assessed during the preceding fiscal year.

(d) Parties eligible for distribution of antidumping and countervailing duties assessed

(1) List of affected domestic producers

The Commission shall forward to the Commissioner within 60 days after the effective date of this section in the case of orders or findings in effect on January 1, 1999, or thereafter, or in any other case, within 60 days after the date an antidumping or countervailing duty order or finding is issued, a list of petitioners and persons with respect to each order and finding and a list of persons that indicate support of the petition by letter or through questionnaire response. In those cases in which a determination of injury was not required or the Commission's records do not permit an identification of those in support of a petition, the Commission shall consult with the administering authority to determine the identity of the petitioner and those domestic parties who have entered appearances during administrative reviews conducted by the administering authority under section 1675 of this title.

(2) Publication of list; certification

The Commissioner shall publish in the Federal Register at least 30 days before the distribution of a continued dumping and subsidy offset, a notice of intention to distribute the offset and the list of affected domestic producers potentially eligible for the distribution based on the list obtained from the Commission under paragraph (1). The Commissioner shall request a certification from each potentially eligible affected domestic producer—

(A) that the producer desires to receive a distribution;

(B) that the producer is eligible to receive the distribution as an affected domestic producer; and

(C) the qualifying expenditures incurred by the producer since the issuance of the order or finding for which distribution under this section has not previously been made.

(3) Distribution of funds

The Commissioner shall distribute all funds (including all interest earned on the funds) from assessed duties received in the preceding fiscal year to affected domestic producers based on the certifications described in paragraph (2). The distributions shall be made on a pro rata basis based on new and remaining qualifying expenditures.

(e) Special accounts

(1) Establishments

Within 14 days after the effective date of this section, with respect to antidumping duty orders and findings and countervailing duty orders notified under subsection (d)(1) of this section, and within 14 days after the date an antidumping duty order or finding or countervailing duty order issued after the effective date takes effect, the Commissioner shall establish in the Treasury of the United States a special account with respect to each such order or finding.

(2) Deposits into accounts

The Commissioner shall deposit into the special accounts, all antidumping or countervailing duties (including interest earned on such duties) that are assessed after the effective date of this section under the antidumping order or finding or the countervailing duty order with respect to which the account was established.

(3) Time and manner of distributions

Consistent with the requirements of subsections (c) and (d) of this section, the Commissioner shall by regulation prescribe the time and manner in which distribution of the funds in a special account shall be made.

(4) Termination

A special account shall terminate after—

(A) the order or finding with respect to which the account was established has terminated;

(B) all entries relating to the order or finding are liquidated and duties assessed collected;

(C) the Commissioner has provided notice and a final opportunity to obtain distribution pursuant to subsection (c) of this section; and

(D) 90 days has elapsed from the date of the notice described in subparagraph (C).

Amounts not claimed within 90 days of the date of the notice described in subparagraph (C), shall be deposited into the general fund of the Treasury.

19 U.S.C. § 2191. Bills implementing trade agreements on nontariff barriers and resolutions approving commercial agreements with Communist countries

(a) Rules of House of Representatives and Senate

This section and sections 2192 and 2193 of this title are enacted by the Congress—

(1) as an exercise of the rulemaking power of the House of Representatives and the Senate, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of implementing bills described in subsection (b)(1) of this section, implementing revenue bills described in subsection (b)(2) of this section, approval resolutions described in subsection (b)(3) of this section, and resolutions described in sections 2192(a) and 2193(a) of this title; and they supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

(b) Definitions

For purposes of this section—

(1) The term ``implementing bill'' means only a bill of either House of Congress which is introduced as provided in subsection (c) of this section with respect to one or more trade agreements, or with respect to an extension described in section 3572(c)(3) of this title, submitted to the House of Representatives and the Senate under section 2112 of this title, section 3572 of this title, or section 3805(a)(1) of this title and which contains—

(A) a provision approving such trade agreement or agreements or such extension,

(B) a provision approving the statement of administrative action (if any) proposed to implement such trade agreement or agreements, and

(C) if changes in existing laws or new statutory authority is required to implement such trade agreement or agreements or such extension, provisions, necessary or appropriate to implement such trade agreement or agreements or such extension, either repealing or amending existing laws or providing new statutory authority.

(2) The term ``implementing revenue bill or resolution'' means an implementing bill, or approval resolution, which contains one or more revenue measures by reason of which it must originate in the House of Representatives.

(3) The term ``approval resolution'' means only a joint resolution of the two Houses of the

Congress, the matter after the resolving clause of which is as follows: ``That the Congress approves the extension of nondiscriminatory treatment with respect to the products of ____ transmitted by the President to the Congress on ____.", the first blank space being filled with the name of the country involved and the second blank space being filled with the appropriate date.

(c) Introduction and referral

(1) On the day on which a trade agreement or extension is submitted to the House of Representatives and the Senate under section 2112 of this title, section 3572 of this title, or section 3805(a)(1) of this title, the implementing bill submitted by the President with respect to such trade agreement or extension shall be introduced (by request) in the House by the majority leader of the House, for himself and the minority leader of the House, or by Members of the House designated by the majority leader and minority leader of the House; and shall be introduced (by request) in the Senate by the majority leader of the Senate, for himself and the minority leader of the Senate, or by Members of the Senate designated by the majority leader and minority leader of the Senate. If either House is not in session on the day on which such a trade agreement or extension is submitted, the implementing bill shall be introduced in that House, as provided in the preceding sentence, on the first day thereafter on which that House is in session. Such bills shall be referred by the

Presiding Officers of the respective Houses to the appropriate committee, or, in the case of a bill containing provisions within the jurisdiction of two or more committees, jointly to such committees for consideration of those provisions within their respective jurisdictions.

(2) On the day on which a bilateral commercial agreement, entered into under subchapter IV of this chapter after January 3, 1975, is transmitted to the House of Representatives and the Senate, an approval resolution with respect to such agreement shall be introduced (by request) in the House by the majority leader of the House, for himself and the minority leader of the House, or by Members of the House designated by the majority leader and minority leader of the House; and shall be introduced (by request) in the Senate by the majority leader of the Senate, for himself and the minority leader of the Senate, or by Members of the Senate designated by the majority leader and minority leader of the Senate. If either House is not in session on the day on which such an agreement is transmitted, the approval resolution with respect to such agreement shall be introduced in that House, as provided in the preceding sentence, on the first day thereafter on which that House is in session. The approval resolution introduced in the House shall be referred to the Committee on Ways and Means and the approval resolution introduced in the Senate shall be referred to the Committee on Finance.

(d) Amendments prohibited

No amendment to an implementing bill or approval resolution shall be in order in either the House of Representatives or the Senate; and no motion to suspend the application of this subsection shall be in order in either House, nor shall it be in order in either House for the Presiding Officer to entertain a request to suspend the application of this subsection by unanimous consent.

(e) Period for committee and floor consideration

(1) Except as provided in paragraph (2), if the committee or committees of either House to which an implementing bill or approval resolution has been referred have not reported it at the close of the 45th day after its introduction, such committee or committees shall be automatically discharged from further consideration of the bill or resolution and it shall be placed on the appropriate calendar. A vote on final passage of the bill or resolution shall be taken in each House on or before the close of the 15th day after the bill or resolution is reported by the committee or committees of that House to which it was referred, or after such committee or committees have been discharged from further consideration of the bill or resolution. If prior to the passage by one House of an implementing bill or approval resolution of that House, that House receives the same implementing bill or approval resolution from the other House, then—

(A) the procedure in that House shall be the same as if no implementing bill or approval resolution had been received from the other House, but

(B) the vote on final passage shall be on the implementing bill or approval resolution of the other House.

(2) The provisions of paragraph (1) shall not apply in the Senate to an implementing revenue bill or resolution. An implementing revenue bill or resolution received from the House shall be referred to the appropriate committee or committees of the Senate. If such committee or committees have not reported such bill or resolution at the close of the 15th day after its receipt by the Senate (or, if later, before the close of the 45th day after the corresponding implementing revenue bill or resolution was introduced in the Senate), such committee or committees shall be automatically discharged from further consideration of such bill or resolution and it shall be placed on the calendar. A vote on final passage of such bill or resolution shall be taken in the Senate on or before the close of the 15th day after such bill or resolution is reported by the committee or committees of the Senate to which it was referred, or after such committee or committees have been discharged from further consideration of such bill or resolution.

(3) For purposes of paragraphs (1) and (2), in computing a number of days in either House,

there shall be excluded any day on which that House is not in session.

(f) Floor consideration in the House

(1) A motion in the House of Representatives to proceed to the consideration of an implementing bill or approval resolution shall be highly privileged and not debatable. An amendment to the motion shall not be in order, nor shall it be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(2) Debate in the House of Representatives on an implementing bill or approval resolution shall be limited to not more than 20 hours, which shall be divided equally between those favoring and those opposing the bill or resolution. A motion further to limit debate shall not be debatable. It shall not be in order to move to recommit an implementing bill or approval resolution or to move to reconsider the vote by which an implementing bill or approval resolution is agreed to or disagreed to.

(3) Motions to postpone, made in the House of Representatives with respect to the consideration of an implementing bill or approval resolution, and motions to proceed to the consideration of other business, shall be decided without debate.

(4) All appeals from the decisions of the Chair relating to the application of the Rules of the House of Representatives to the procedure relating to an implementing bill or approval resolution shall be decided without debate.

(5) Except to the extent specifically provided in the preceding provisions of this subsection, consideration of an implementing bill or approval resolution shall be governed by the Rules of the House of Representatives applicable to other bills and resolutions in similar circumstances.

(g) Floor consideration in the Senate

(1) A motion in the Senate to proceed to the consideration of an implementing bill or approval resolution shall be privileged and not debatable. An amendment to the motion shall not be in order, nor shall it be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(2) Debate in the Senate on an implementing bill or approval resolution, and all debatable motions and appeals in connection therewith, shall be limited to not more than 20 hours. The time shall be equally divided between, and controlled by, the majority leader and the minority leader or their designees.

(3) Debate in the Senate on any debatable motion or appeal in connection with an implementing bill or approval resolution shall be limited to not more than 1 hour, to be equally divided between, and controlled by, the mover and the manager of the bill or resolution, except that in the event the manager of the bill or resolution is in favor of any such motion or appeal, the time in opposition thereto, shall be controlled by the minority leader or his designee. Such leaders,

or either of them, may, from time under their control on the passage of an implementing bill or approval resolution, allot additional time to any Senator during the consideration of any debatable motion or appeal.

(4) A motion in the Senate to further limit debate is not debatable. A motion to recommit an implementing bill or approval resolution is not in order.

19 U.S.C. § 3311. Approval and entry into force of North American Free Trade Agreement

(a) Approval of Agreement and statement of administrative action

Pursuant to section 2903 of this title and section 2191 of this title, the Congress approves —

> (1) the North American Free Trade Agreement entered into on December 17, 1992, with the Governments of Canada and Mexico and submitted to the Congress on November 4, 1993; and
>
> (2) the statement of administrative action proposed to implement the Agreement that was submitted to the Congress on November 4, 1993.

19 U.S.C. § 3312. Relationship of the Agreement to United States and State law

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(c) Effect of Agreement with respect to private remedies

No person other than the United States—

(1) shall have any cause of action or defense under—

(A) the Agreement or by virtue of Congressional approval thereof, or

(B) the North American Agreement on Environmental Cooperation or the North American Agreement on Labor Cooperation; or

(2) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with the Agreement, the North American Agreement on Environmental Cooperation, or the North American Agreement on Labor Cooperation.

19 U.S.C. § 3438. Treatment of amendments to antidumping and countervailing duty law

Any amendment enacted after the Agreement enters into force with respect to the United States that is made to—

(1) section 303 or title VII of the Tariff Act of 1930 [19 U.S.C. 1671 *et seq.*], or any successor statute, or

(2) any other statute which—

(A) provides for judicial review of final determinations under such section, title, or successor statute, or

(B) indicates the standard of review to be applied,

shall apply to goods from a NAFTA country only to the extent specified in the amendment.

19 U.S.C. § 3511. Approval and entry into force of Uruguay Round Agreements

(a) Approval of agreements and statement of administrative action

Pursuant to section 2903 of this title and section 2191 of this title, the Congress approves –

(1) the trade agreements described in subsection (d) of this section resulting from the Uruguay Round of multilateral trade negotiations under the auspices of the General Agreement on Tariffs and Trade, entered into on April 15, 1994, and submitted to the Congress on September 27, 1994; and

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19 U.S.C. § 3512. Relationship of agreements to United States law and State law

****

(c) Effect of agreement with respect to private remedies

(1) Limitations

No person other than the United States –

(A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or

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28 U.S.C. § 1581. Civil actions against the United States and agencies and officers thereof

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(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court of International Trade under section 516A(a) of the Tariff Act of 1930 or by a binational panel under article 1904 of the North American Free Trade Agreement or the United States-Canada Free-Trade Agreement and section 516A(g) of the Tariff Act of 1930.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Court No. 2006-1622, 2006-1625, 2006-1626, 2006-1627, 2006-1636, 2006-1648

CANADIAN LUMBER TRADE ALLIANCE, et al.,	)
	)
v.	)
	)
UNITED STATES, et al.	)

Combined Opposition Brief for Plaintiff-Appellees Canadian Lumber Trade Alliance, Norsk Hydro Canada, Inc., Canadian Wheat Board, Ontario Forest Industries Association, Ontario Lumber Manufacturers Association and The Free Trade Lumber Council, and Opening Brief for Plaintiff-Cross Appellant Government of Canada

(May 14, 2007)

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By including the reference to "Congressional approval" in Section 102(c), Congress merely ensured that private litigants would not evade the prohibition on [Page 95] bringing a private right of action based on the unenacted provisions of NAFTA by grounding such a claim in congressional approval of NAFTA in Section 101(a) of the NIA. This

"bootstrapping" is, however, radically different from the Canadian producers' and Canada's actions here. Those actions are brought pursuant to a separate provision of the NIA itself, Section 408, that is a freestanding provision of federal statutory law, and which serves as the basis for interpreting another independent federal statute, the CDSOA.

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DEFICIT REDUCTION ACT OF 2005

Pub. L. 109-171

[120 Stat. 4]

[Page 154]

Sec. 7601. REPEAL OF CONTINUED DUMPING AND SUBSIDY OFFSET.

(a) Repeal.--Effective upon the date of enactment of this Act, section 754 of the Tariff Act of 1930 (19 U.S.C. 1675c), and the item relating to section 754 in the table of contents of title VII of that Act, are repealed.

(b) Distributions on Certain Entries.--All duties on entries of goods made and filed before October 1, 2007, that would, but for subsection (a) of this section, be distributed under section 754 of the Tariff Act of 1930, shall be distributed as if section 754 of the Tariff Act of 1930 had not been repealed by subsection (a).

The Journal of Legal Studies

The President's Rational Choice of a Treaty's Preratification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement?

John K. Setear

31 J. Legal Stud. S5 (2002)

[Page S29]

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Trade liberalization agreements, and related agreements in international finance, are a different matter. While arms control agreements especially affect the uniformed military and a handful of arms manufacturers, trade agreements impinge upon the interests of a wide range of manufacturers, service providers, labor unions, and consumers. Export-oriented enterprises may have a very different view of such an agreement from import-oriented enterprises; businesses focused on domestic markets are likely to have their own perspective as well. The plethora of oxen potentially gored is likely to make for a complex and fragile bargain, especially since many of the interests at issue will be well funded and politically vocal.

In such a situation, the most pressing preratification concern that the president will need to assuage is that the negotiated agreement will fall apart when Congress must actually convert the international agreement into a set of domestic measures that lower particular U.S. tariffs, relax particular nontariff barriers to imports into the United States, and cut back on various implicit or

explicit subsidies to U.S. companies. Those who seek a signal from the United States on the viability and stability of a trade agreement therefore seem likely to worry more about the relatively short-term prospects of congressional implementing legislation that reflects the agreement than about broader or deeper political support for the cooperative endeavor. Indeed, it is presumably no coincidence that the fast-track procedure both effectively merges legislative approval with implementing legislation and that Congress has granted fast-track authority only with respect to trade agreements. Not only the president but also Congress has seemed fearful that, absent such a procedure, there will be no way for the United States to send a sufficiently credible signal about the likelihood that implementing legislation will follow the same shape as the bargain struck in the international agreement. Congress thus is willing to engage in the self-paternalism (and presumed loss of bargaining power) inherent in granting fast-track authority in order to persuade foreign nations to make the international bargain at all.

The treatment of arms control agreements and of trade liberalization and international financial treaties is thus consistent with a signaling theory. The depth and relative permanence implied in the signal of success with the Article II procedure, and the likelihood of conforming implementing legislation signaled by success with a congressional-executive agreement, show a broad conformity with behavior.

Constitutional Commentary

Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation

Larry Alexander and Saikrishna Prakash

20 Const. Comment. 97 (2003)

[Page 105]

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We start with the unremarkable proposition that Congress may not add to the constitutional requirements necessary to pass a law. Under the Constitution, any Congress may make statutes out of bills if the bills undergo bicameralism and presentment. No Congress may require by statute that future members of Congress clap their hands prior to legislating, or think deep constitutional thoughts prior to passing a bill related to the Constitution, or spin around three times prior to repealing a statute. Congress lacks the direct legislative authority that would authorize such statutes, and it is difficult to see how such a statute would be "necessary and proper" to carry into execution any power of either Congress or of the federal government more generally. We believe that Rosenkranz agrees with our claim thus far. We do not believe that he possibly holds the view that any Congress may require future Congresses to bark like seals prior to legislating.

What is true of these physical actions is true of required texts as well. Congress may not force a future Congress to use particular language to legislate. If a meaning emerges from a statute, that meaning must control, rather than some artificial

meaning that emerges from an inflexible adherence to rule of interpretation promulgated by a prior Congress.

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American Constitutional Law (3d ed. 2000)

Laurence H. Tribe

[Page 125 n.1]

Separation of powers doctrines derived from the Federal Constitution do not speak directly to allocations of authority within state governments. []. Nor does the separation of powers address the ability of the officers of one branch of government to bind their successors within that branch. Although the law made by any branch—whether by legislation, executive order, or judicial decision—may extend beyond the tenure of particular officeholders, the Constitution limits trans-temporal commandeering of a branch by its current occupants through the device of generally preventing any branch from making the metalaw necessary to tie the hands of future officeholders in that branch. For example, an executive order by a sitting President may remain in force after his tenure such that a subsequent president would be bound by it, see United States v. Nixon, 418 U.S. 683, 696 (1974), but not if that subsequent President were simply to issue a new executive order rescinding the first.

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The interpretive rules set forth in the McCarran-Ferguson Act and RFRA purport to require future Congresses to include specific references—to the insurance business or to RFRA itself, respectively—in order for statutes to bear particular meanings. But it would seem to raise serious constitutional questions for a court to rely

upon the limiting provisions of the McCarran-Ferguson Act or of RFRA restrictively to construe a statute that other interpretive indicia, taken as a whole, suggest is best read, respectively, as applying to insurance or as being exempt from the standards established in RFRA, Automatically to give determinative weight in such circumstances to previously enacted legislative "rules" of construction would in a sense permit an earlier Congress to add to art. I's requirements for the enactment of laws by a later Congress.

North American Free Trade Agreement

Article 1902: Retention of Domestic Antidumping Law and Countervailing Duty Law

1. Each Party reserves the right to apply its antidumping law and countervailing duty law to goods imported from the territory of any other Party. Antidumping law and countervailing duty law include, as appropriate for each Party, relevant statutes, legislative history, regulations, administrative practice and judicial precedents.

2. Each Party reserves the right to change or modify its antidumping law or countervailing duty law, provided that in the case of an amendment to a Party's antidumping or countervailing duty statute:

> (a) such amendment shall apply to goods from another Party only if the amending statute specifies that it applies to goods from that Party or from the Parties to this Agreement;

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Pension Protection Act of 2006

Pub. L. No. 109-280

[120 Stat 780]

Sec. 1632. SUSPENSION OF NEW SHIPPER REVIEW PROVISION.

(a) Suspension of the Availability of Bonds to New Shippers. – Clause (iii) of section 751(a)(2)(B) of the Tariff Act of 1930 (19 U.S.C. 1675(a)(2)(B)(iii)) shall not be effective during the period beginning on April 1, 2006, and ending on June 30, 2009.

(b) Report on the Impact of the Suspension. – Not later than December 31, 2008, the Secretary of the Treasury, in consultation with the Secretary of Commerce, the United States Trade Representative, and the Secretary of Homeland Security, shall submit to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate a report containing–

> (1) recommendations on whether the suspension of section 751(a)(2)(B)(iii) of the Tariff Act of 1930 should be extended beyond the date provided in subsection (a); and
>
> (2) an assessment of the effectiveness of any administrative measure that was implemented to address the difficulties that necessitated the suspension under subsection (a), including–
>
> > (A) any problem in the collection of antidumping duties on imports from new shippers; and

(B) any burden imposed on legitimate trade and commerce by the suspension of bonds to new shippers.

(c) Report on Collection Problems and Analysis of Proposed Solutions. –

(1) Report. – Not later than 180 days after the date of the enactment of this Act, the Secretary of the Treasury, in consultation with the Secretary of Homeland Security and the Secretary of Commerce, shall submit to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate a report describing–

(A) any major problem experienced in the collection of duties during the 4 most recent fiscal years for which data are available, including any fraudulent activity intended to avoid payment of duties; and

(B) an estimate of the total amount of duties that were uncollected during the most recent fiscal year for which data are available, including, with respect to each product, a description of why the duties were uncollected.

(2) Recommendations. – The report shall include–

(A) recommendations on any additional action needed to address problems related to the collection of duties; and

(B) for each recommendation–

(i) an analysis of how the recommendation would address the specific problem; and

(ii) an assessment of the impact that implementing the recommendation would have on international trade and commerce (including any additional costs imposed on United States businesses).

No. 99-119

In the Supreme Court of the United States

BRONCO WINE COMPANY, PETITIONER

v.

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Petitioner's attempt to distinguish 19 U.S.C. 3512(c)(1) is not persuasive. Petitioner concedes that Section 3512(c)(1)(A) expressly bars "private rights of action" to enforce the Uruguay Round

Agreements. But that barrier to suit, petitioner contends, does not apply to suits for judicial review under the APA, since the absence of a "private right of action under the statute challenged" does not preclude the same action from being brought under the APA. Pet. 10-11. Petitioner, however, ignores half of Section 3512(c)(1)(A)'s text. Section 3512(c)(1)(A) does not merely prohibit the recognition of causes of action or defenses "under" the Uruguay Round Agreements. Instead, it also declares that no individual "shall have *any* cause of action or [Page 10] defense * * * *by virtue* of congressional approval of" the Uruguay Round Agreements (emphasis added). Manifestly, petitioner's cause of action-its very claim -arises solely because of (*i.e.*, by virtue of) congressional approval of the Uruguay Round Agreements. Indeed, absent Congress's approval of those Agreements in the Uruguay Round Act, the Lanham Act provision on which petitioner relies would not exist and petitioner would have no claim at all. Because petitioner's claims arise "by virtue of" Congress's approval of the Uruguay Round Agreements in the Uruguay Round Act, those claims are barred by Section 3512(c)(1)(A).

Petitioner's suit is likewise precluded by Section 3512(c)(1)(B), which bars any suit, "under any provision of law," challenging agency "action or inaction" as inconsistent with the Uruguay Round Agreements.

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Statement of Administrative Action Accompanying NAFTA Implementation Act

[H.R. Doc. No. 103-159 (I) (1993)]

[Page 454]

A. SUMMARY OF NAFTA PROVISIONS

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3. Definitions and Final Provisions

Chapter Two defines certain terms that appear frequently in various chapters of the Agreement.

Chapter Twenty-Two sets out a number of provisions of general applicability. Article 2201 makes clear that the NAFTA's annexes are to be considered part of the Agreement itself. Article 2202 provides for amendments to the Agreement. Under Article 2203, the NAFTA is to enter into force on January 1, 1994, as between those governments certifying in an exchange of diplomatic notes that they have completed domestic legal procedures.

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[B. ACTION REQUIRED OR APPROPRIATE TO IMPLEMENT THE NAFTA]

[1. Implementing Bill]

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f. Private Lawsuits

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The prohibition of a private right of action based on the NAFTA, or on Congressional approval of the Agreement in section 101(a), does not preclude the exercise of [Page 463] the right to challenge certain provisions of the implementing bill provided for in section 516A(g)(4) of the Tariff Act of 1930 pursuant to section 414(6) of the implementing bill.

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Trade and International Economic Policy Reform Act of 1987

H.R. Rep. No. 100-40 (I) (1987)

[Page 48]

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Section 114. Implementation of Trade Agreements

Present Law

In contrast to traditional tariff proclamation authority, a nontariff barrier agreement negotiated under section 102 authority cannot enter into force for the United States and become binding as a matter of domestic law unless the President adheres to certain requirements for presentation to the Congress and implementing legislation approving the agreement and any changes in U.S. law is enacted into law. Special notice and expedited "fast track" no amendment procedures under section 102(d)-(f) and sections 151-154 of the Trade Act of 1974 apply for Congressional consideration and approval of nontariff and bilateral trade agreements. No nontariff trade agreement provisions may enter into force for the United States and the President cannot proclaim any duty modifications under bilateral agreements entered into under section 102 unless there is compliance with these requirements.

Section 102(d)-(f) and sections 151-154 prescribe the following advance notice and "fast track" procedures for Congressional approval of implementing legislation for nontariff or bilateral trade agreements entered into under section 102:

(1) The President must notify the Congress of his intention to enter into the agreement 90 days before doing so, and thereafter promptly publish his intention in the Federal Register.

(2) After entering into the agreement, the President must submit a copy of the agreement to the Congress, together with a draft implementing bill, a statement of any administrative actions proposed to implement the agreement, an explanation of how the bill and [Page 49] statement change or affect existing law, and a statement of reasons the agreement serves the interests of U.S. commerce and why the bill and proposed action are required and appropriate. An implementing bill must contain provisions approving the agreement and the statement of administrative action, and any amendments to current law or new authority required or appropriate to implement the agreement.

(3) The implementing bill is introduced in both Houses of Congress on the day it is submitted by the President. This bill is referred to the committee or committees of jurisdiction. The committees have 45 legislative days in which to report the bill; a committee is discharged automatically from further consideration after that period.

(4) Each House voted on the bill within 15 legislative days after the measure has been received from the committee or committees. A motion in the House to proceed to consideration of the implementing bill is privileged and not debatable. Amendments are not in order, and debate is limited to not more than 20 hours.

Although statutory, the procedures in paragraphs (2), (3), and (4) were enacted as an exercise of the rulemaking powers of each House of Congress, and are decreed to be a part of the rules of the House and of the Senate. The procedures may be changed in the same manner as any other rules.

In order to ensure that a foreign country which benefits from a section 102 trade agreement is also subject to the obligations, the President may recommend to Congress in the implementing bill and statement of administrative action that the benefits and obligations apply solely to the parties to the agreement, if such application is consistent with the terms of the agreement.

UNITED STATES-CANADA FREE-TRADE AGREEMENT IMPLEMENTATION ACT OF 1988

Pub. L. No. 100-449

[102 Stat. 1851]

[Page 1853]

SEC. 102. RELATIONSHIP OF THE AGREEMENT TO UNITED STATES LAW.

****

(c) EFFECT OF AGREEMENT WITH RESPECT TO PRIVATE REMEDIES.

No person other than the United States shall –

(1) have any cause of action or defense under the Agreement or by virtue of congressional approval thereof, or

****

UNITED STATES-CANADA FREE-TRADE AGREEMENT IMPLEMENTATION ACT OF 1988

S. Rep. No. 100-509

[Page 11]

[1988 U.S.C.C.A.N. Page 2405]

****

[Relationship of the Agreement to U.S. Law (Section 102)]

****

(c) Private right of action excluded—

Subsections (b)(3) and (c) deal with the question of whether either the Agreement or this bill creates a private right of action to challenge Government action on the ground that it is inconsistent with the obligations of the United States under the Agreement. Private remedies on this ground are barred. The bill provides that no person other than the United States shall have a cause of action or defense under the Agreement or by reason of Congressional approval of the Agreement (the only exception is with regard to a constitutional challenge to the binational dispute panel under section 516A(g)(4), as provided in section 401(c) of the bill). Moreover, subsection (c) forecloses a challenge in any action under any provision of law to action or inaction by any agency of Federal, State or local government on the ground of inconsistency with the Agreement.

UNITED STATES-COLUMBIA TRADE PROMOTION AGREEMENT IMPLEMENTATION ACT

H.R. 5724

SEC. 102. RELATIONSHIP OF THE AGREEMENT TO UNITED STATES AND STATE LAW.

****

(c) Effect of Agreement with respect to private remedies - No person other than the United States --

(1) shall have any cause of action or defense under the Agreement or by virtue of Congressional approval thereof, or

(2) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State, on the ground that such action or inaction is inconsistent with the Agreement.

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SUPREME COURT, U.S.

No. 07-1470

In the Supreme Court of the United States

UNITED STATES STEEL CORPORATION, ET AL.,
PETITIONERS

v.

CANADIAN LUMBER TRADE ALLIANCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that Section 102(c) of the North American Free Trade Agreement Implementation Act (NAFTA Implementation Act), 19 U.S.C. 3312(c), did not bar plaintiffs' challenge of the United States Bureau of Customs and Border Protection's interpretation of the Continued Dumping and Subsidy Offset Act of 2000, Pub. L. No. 106-387, App.—H.R. 5426, Tit. X, 114 Stat. 1549A-72, as applying to antidumping duties collected upon Canadian goods.

2. Whether Section 408 of the NAFTA Implementation Act is an impermissible legislative entrenchment provision.

3. Whether petitioners, who intervened as defendants in actions brought by plaintiffs whose complaints were dismissed, are proper parties to seek certiorari from a judgment in favor of another plaintiff whose claims were consolidated with the actions in which petitioners intervened.

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In the Supreme Court of the United States

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UNITED STATES STEEL CORPORATION, ET AL.,
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-49a) is reported at 517 F.3d 1319. The opinions of the United States Court of International Trade (Pet. App. 50a-176a) are reported at 425 F. Supp. 2d 1321 and 441 F. Supp. 2d 1259.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 2008. The petition for a writ of certiorari was filed on May 27, 2008 (the Tuesday following Memorial Day). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress approved and implemented the North American Free Trade Agreement (NAFTA or Agreement), 32 I.L.M. 605 (1993), through the North American Free Trade Agreement Implementation Act (NAFTA Implementation Act or NIA), Pub. L. No. 103-182, 107 Stat. 2057, 19 U.S.C. 3301 *et seq.* Section 408 of the NIA provides that any amendment to United States antidumping and countervailing duty law "enacted after the Agreement enters into force with respect to the United States * * * shall apply to goods from a NAFTA country only to the extent specified in the amendment." 19 U.S.C. 3438. Section 102(c) of the NIA states, in part, that "[n]o person other than the United States * * * shall have any cause of action or defense under * * * the Agreement or by virtue of Congressional approval thereof." 19 U.S.C. 3312(c)(1)(A).

2. In 2000, Congress modified the disbursal of funds collected pursuant to antidumping and countervailing duty orders through enactment of the Continued Dumping and Subsidy Offset Act of 2000 (CDSOA), Pub. L. No. 106-387, App.—H.R. 5426, Tit. X, 114 Stat. 1549A-72. 19 U.S.C. 1675c (2000). Pursuant to the CDSOA, the United States placed funds received from antidumping and countervailing duty orders in special sub-accounts within the United States Treasury, and later disbursed the funds to qualifying domestic producers that were affected by the unfair trade practices that gave rise to the antidumping or countervailing duty. 19 U.S.C. 1675c. The CDSOA did not expressly state that its provisions applied to Canadian or Mexican merchandise. On February 8, 2006, Congress repealed the CDSOA, with effect on all goods imported on or after October 1,

2007. Pub. L. No. 109-171, Tit. VII, subtit. F, § 7601(a) & (b), 120 Stat. 154.

3. In 2005, Canadian producers of softwood lumber, magnesium, and red wheat—merchandise subject to countervailing or antidumping duty orders—commenced separate actions in the Court of International Trade, challenging the application of the CDSOA to duties collected on their Canadian merchandise. Pet. App. 11a.[1] The Government of Canada brought a similar action, seeking general relief with respect to Canadian merchandise subject to countervailing or antidumping duties. *Ibid.* Specifically, plaintiffs alleged that United States Bureau of Customs and Border Protection (Customs) is not permitted to disburse to domestic producers CDSOA monies resulting from antidumping and countervailing duties imposed upon Canadian merchandise because Congress did not intend the CDSOA to apply to goods from Canada. *Ibid.* Plaintiffs requested a declaratory judgment, a permanent injunction against further distributions to domestic producers, and disgorgement of prior distributions to domestic producers. *Id.* at 11a-12a.

Petitioners intervened in the respective actions concerning disbursement of duties of which they were recipients. Petitioner U.S. Magnesium intervened in the action brought by respondent Norsk Hydro Canada Inc. with respect to distribution of duties to domestic producers of pure and alloy magnesium, including U.S. Magnesium. 05-cv-00325 Docket entry No. 17 (Ct. Int'l Trade July 5, 2005); *id.*, entry No. 24 (July 12, 2005). Petitioner United States Steel intervened in the action

[1] Plaintiffs' suit, brought pursuant to 28 U.S.C. 1581(i), was governed by the Administrative Procedure Act, 5 U.S.C. 702. See 28 U.S.C. 2640(e); Pet. App. 11a.

brought by the Government of Canada, which encompassed distribution of duties to domestic producers of corrosion-resistant carbon steel flat products, cut-to-length carbon steel plate, and oil country tubular goods, all of which were produced by United States Steel. 05-cv-00327 Docket entry No. 28 (Ct. Int'l Trade July 5, 2005); *id.*, entry No. 41 (July 7, 2005). Neither petitioner sought to intervene in the action brought by the Canadian Wheat Board (Board), which challenged Customs' application of the CDSOA to duties collected on Canadian spring red wheat. After petitioners had intervened in the individual Norsk Hydro Canada and Government of Canada actions, all the Canadian actions were consolidated in the Court of International Trade. See 05-cv-00324 Docket entry No. 29 (Ct. Int'l Trade July 13, 2005).

Following briefing and a factual hearing on the issue of injury for purposes of Article III standing, the Court of International Trade held that the private Canadian plaintiffs, but not the Government of Canada, possessed standing. Pet. App. 102a, 107a. The court further held that the private plaintiffs' claims were not barred by Section 102(c) of the NIA, 19 U.S.C. 3312(c). Pet. App. 119a-137a. The court reasoned that the bar against causes of action or defenses "under * * * the Agreement or by virtue of Congressional approval thereof," 19 U.S.C. 3312(c)(1)(A), made clear that "neither the Agreement or Congress' consent thereto [in NIA Section 101(a), 19 U.S.C. 3311(a)], would create a right of action under NAFTA itself," but did "not foreclose rights of action under" other provisions of the NIA that "separately implemented portions of that Agreement by enacting specific provisions into domestic law." Pet. App. 130a-131a.

On the merits, the trial court held that Section 408 of the NAFTA Implementation Act, 19 U.S.C. 3438, "function[s] as [a] background canon[] of interpretation of which Congress [was] presumptively aware" when it enacted the CDSOA, Pet. App. 148a (quoting *Lockhart* v. *United States*, 546 U.S. 142, 148 (2005) (Scalia, J., concurring)). The court found neither a "necessary" nor even a "fair" implication that Congress intended the CDSOA to apply in contravention of the interpretive guidance of Section 408, and on that basis it concluded that Congress did not intend to apply the CDSOA to antidumping and countervailing duties collected upon products from Canada and Mexico. *Id.* at 147a. With respect to remedies, the court declined to order disgorgement of duties that had already been disbursed to domestic industries by Customs. *Id.* at 158a-173a. The court entered a declaratory judgment that the CDSOA "does not apply to antidumping and countervailing duties assessed on imports of goods from Canada or Mexico," *id.* at 160a, 175a, and also ordered prospective injunctive relief, *id.* at 160a-161a, 175a-176a. Because it had dismissed the claims of the Government of Canada, the Court of International Trade expressly limited its injunctive relief to future distributions of duties derived from softwood lumber, hard red spring wheat, and magnesium imported from Canada. *Id.* at 175a-176a.

4. The United States appealed the trial court's holding that the private Canadian plaintiffs possessed standing, the Government of Canada appealed the trial court's holding that it lacked standing, and petitioners and certain other domestic producers that had intervened in the trial court appealed that court's holdings that: (1) the private Canadian plaintiffs possessed standing; (2) Section 102(c) of the NAFTA Implementation Act did not

bar the private plaintiffs' claims; and (3) the CDSOA does not apply to antidumping and countervailing duties collected upon merchandise from Canada and Mexico. The private Canadian plaintiffs did not appeal the judgment of the Court of International Trade to the extent it denied their request for disgorgement of already distributed duties. Pet. App. 36a. The North Dakota Wheat Commission, the one domestic entity that had intervened in the Court of International Trade in the proceeding brought by the Canadian Wheat Board, withdrew its intervention on July 13, 2006, and did not appeal. See 05-cv-00324 Docket entry No. 142 (Ct. Int'l Trade).

The court of appeals vacated the trial court's judgment and remanded with directions to dismiss as to the claims brought by all but one of the private Canadian plaintiffs because their suits had become moot. Pet. App. 36a-37a. The court of appeals affirmed the judgment with respect to the remaining plaintiff. *Id.* at 48a-49a. With respect to the claims by the Canadian producers of softwood lumber and magnesium, the court held that post-judgment developments had rendered their claims moot. *Id.* at 36a-37a. The court noted that two significant actions occurred shortly after the Court of International Trade's judgment. First, the United States and Canada had entered into an Executive Agreement in which the United States agreed to revoke, retroactive to May 2002, the antidumping and countervailing duty orders concerning Canadian softwood lumber. *Id.* at 15a. Second, pursuant to that Executive Agreement, the Department of Commerce had instructed Customs to cease collecting duty deposits on softwood lumber as of October 12, 2006, to liquidate all unliquidated entries without regard to the revoked orders,

and to refund to the importers of record any deposits that had been collected pursuant to the revoked orders. *Id.* at 15a-16a. The court of appeals held that, because there was "no threat of further injury to the Canadian Producers in the softwood lumber industry," the claims of the Canadian softwood lumber producers for declaratory and injunctive relief were moot. *Id.* at 36a.

The court of appeals likewise held that the claims of the sole Canadian magnesium producer had become moot. Pet. App. 36a-37a. The court noted that the countervailing duty orders on pure and alloy magnesium from Canada had been revoked on July 6, 2006, shortly after the Court of International Trade's judgment, and that the sole plaintiff with respect to that product, Norsk Hydro Canada, had announced its intent to close its Canadian plant during the first half of 2007. *Id.* at 16a. In light of those developments, the court of appeals held that Norsk Hydro Canada no longer could claim likely competitive injury based on CDSOA distributions and that its claims for declaratory and injunctive relief were therefore moot. *Id.* at 37a. The court of appeals also affirmed the Court of International Trade's conclusion that the Government of Canada lacked standing, although on different grounds from those relied upon by the trial court. See *id.* at 28a-34a.

The court determined that the Canadian Wheat Board alone among the plaintiffs had standing to assert claims that were not moot. Pet. App. 20a, 37a. The court affirmed the Court of International Trade's finding of fact that the promotional activities of the North Dakota Wheat Commission had been responsible for helping domestic wheat producers take market share from the Canadian Wheat Board, and its determination that receipt by the Commission of as much as $180,000

in CDSOA distributions was likely to further injure the Board. *Id.* at 25a, 37a.

Turning to the substance of the dispute, the court of appeals affirmed the Court of International Trade's conclusion that Section 102(c) of the NAFTA Implementation Act, 19 U.S.C. 3312(c), did not preclude the Canadian Wheat Board from pursuing its challenge to distribution of duties to the North Dakota Wheat Commission under the CDSOA. The court of appeals reasoned that "section 102(c)'s bar against causes of action based on 'the Agreement or by virtue of congressional approval thereof,' reads most naturally as barring only those suits brought under NAFTA itself or under section 101" of the NAFTA Implementation Act, 19 U.S.C. 3311, in which Congress approved NAFTA. Pet. App. 39a. Because the Board's suit was not brought under NAFTA or Section 101 of the NAFTA Implementation Act, the court of appeals concluded that Section 102(c) did not preclude judicial review of the Board's claim. *Id.* at 43a.

On the merits, the court of appeals affirmed the Court of International Trade's conclusion that Congress did not intend the CDSOA to apply to antidumping and countervailing duties collected on Canadian and Mexican merchandise. Pet. App. 43a-48a, 49a. In reaching that conclusion, the court relied upon the reasoning of the Court of International Trade. *Id.* at 44a. The court rejected the contention that because the CDSOA does not expressly except goods from NAFTA countries, the court "must infer from this silence that Congress intended the CDSOA to apply to goods from NAFTA countries regardless of section 408 of the NIA." *Id.* at 45a. The court reasoned, to the contrary, that the more reasonable inference from Congress's silence was that, "being aware of its earlier enactment of section 408 of

the NIA, [Congress] chose not to supercede section 408 nor to exempt the CDSOA from it." *Id.* at 46a. Finally, the court rejected the argument that Section 408 did not apply because the CDSOA was enacted as part of an appropriations bill and therefore constituted an exercise of Congress's spending power that was only tangentially related to the Tariff Act of 1930, ch. 497, 46 Stat. 590 and outside the reach of Section 408 of the NIA. The court noted that the CDSOA directs the creation of special accounts in the Treasury for deposit of antidumping or countervailing duties and distribution of funds in the special accounts to qualified domestic producers, such that deposited amounts would only rarely, if ever, reach the Treasury's general fund. *Id.* at 47a. The court therefore concluded that "the Canadian Wheat Board does in fact have recourse to challenge Customs' actions in this case." *Id.* at 48a.

Although the court of appeals affirmed the substance of the Court of International Trade's judgment, it struck that court's injunctive relief beyond that relating to Canadian wheat. Pet. App. 48a-49a. The court of appeals noted that "[t]he Canadian Wheat Board does not have standing to seek an injunction against distribution of duties assessed on softwood lumber or magnesium," but only with respect to "duties assessed on hard red spring wheat from Canada." *Id.* at 37a-38a n.22. The court of appeals therefore directed that the injunction be modified to strike the relief granted with respect to distribution of duties relating to softwood lumber and magnesium. *Id.* at 49a.

ARGUMENT

Petitioners contend that Section 102(c) of the NAFTA Implementation Act, 19 U.S.C. 3312(c), pre-

cludes any private party from invoking any provision of the NAFTA Implementation Act. The court of appeals correctly rejected that argument. Moreover, the court's holding on the merits concerns the construction of a statute that has been repealed, and the underlying dispute arose in the context of an international trade dispute that has been resolved in significant part by Executive Agreement. That holding therefore does not warrant this Court's review.

Nor does petitioners' challenge to Section 408 of the NIA as an impermissible legislative entrenchment warrant this Court's review because the court of appeals did not apply Section 408 in that fashion. Rather, it treated the provision as a guide to legislative interpretation that was not overcome by any contrary indications. We note, in addition, that if the Court were to grant the petition for a writ of certiorari, it would, before reaching the questions presented by petitioners, need to resolve the threshold question of whether petitioners, who intervened in defense against claims asserted by plaintiffs whose complaints have since been dismissed by the lower courts, are proper parties to seek review of the court of appeals' judgment.

1. The court of appeals correctly rejected the sweeping construction of Section 102(c) of the NIA offered by petitioners, and its holding does not warrant this Court's review.

a. Section 102(c) of the NIA provides, in relevant part, that "[n]o person other than the United States * * * shall have any cause of action or defense under * * * the Agreement or by virtue of Congressional approval thereof." 19 U.S.C. 3312(c)(1)(A). In enacting that provision, Congress made it clear that NAFTA does not constitute enforceable domestic law except in a suit

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brought by the United States. Congress intended NAFTA to be viewed as a government-to-government agreement that, with certain exceptions not relevant here, cannot be enforced by private individuals and, thus, cannot provide the basis for any private claim or defense asserted in domestic courts. Section 102(c) confirms that Congress intended NAFTA to be viewed as an agreement that generally affects only the rights and obligations of the sovereign nations and that therefore cannot provide the basis for any private claim or defense asserted in domestic courts. *Kwan* v. *United States*, 272 F.3d 1360, 1362-1363 (Fed. Cir. 2001) (citing *Edye* v. *Robertson*, 112 U.S. 580, 598 (1884)) (additional citations omitted).

Petitioners challenge the court of appeals' characterization of Section 102(c) "*as barring only those suits brought under NAFTA itself or under section 101 of the* [NIA]." Pet. 25 (quoting, with added emphasis, Pet. App. 39a). See Pet. 26 (describing the court of appeals' decision as holding that Section 102(c) "only bars causes of action that arise under Section 101(a) of the NAFTA Implementation Act"). The United States agrees that the quoted language could, depending on how it is applied in future cases, give too cramped a reading to Section 102(c). The section's reference to "defense[s]" in addition to "cause[s] of action," 19 U.S.C. 3312(c)(1)(A), and its further prohibition against challenging government action or inaction "on the ground that such action or inaction is inconsistent with the Agreement," 19 U.S.C. 3312(c)(2), reflects that Congress intended not only to preclude suits asserting purported causes of action based directly on NAFTA or Section 101 of the implementing legislation, but more broadly to preclude private parties from relying on the provisions of NAFTA

in support of a claim or defense, even when the suit is brought under a general statutory provision such as the APA. To the extent the court of appeals' decision can be read to suggest that Section 102(c) is inapposite merely because "the Canadian Wheat Board instituted this suit under" the APA, Pet. App. 38a, such a reading of Section 102(c) would be erroneous.

Contrary to petitioners' suggestion, however, the actual holding of the court of appeals was the narrower one that Section 102(c) does not preclude a private party—in a suit contesting application of the CDSOA to Canadian goods—from invoking the interpretive guidance provided by Section 408 of the NIA. To be sure, there is room for debating the precise question whether Section 408 should be regarded, in light of the policies reflected in Section 102(c), as the type of statutory provision that Congress intended to be invoked by private parties or merely as reflecting the sovereign-to-sovereign commitments undertaken in NAFTA Article 1902. See Gov't Reply in Support of Its Motions to Dismiss 3-7. But that is because of the particular nature of the undertaking in Article 1902 of NAFTA, 32 I.L.M. 682, which states a rule similar to that in Section 408, see Pet. App. 40a, not because of a categorical rule that no provision of the implementing legislation can be invoked by private parties. In the court of appeals, the United States argued, for example, that the private plaintiffs lacked prudential standing because Section 408 should not be construed as intending to protect the interests of private producers. See Gov't C.A. Br. 46-49.[2] The court of appeals rejected

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[2] In the Court of International Trade, the United States had urged that the Government of Canada's and private plaintiffs' claims, while styled as relying on Section 408 of the NIA, were in fact attempts to give impermissible direct judicial effect to NAFTA Article 1902(2), 32

that contention, see Pet. App. 28a, and petitioners do not seek review of that narrow question of statutory construction.

b. Petitioners argue that Section 102(c) broadly precludes any private party from attempting to give *any* legal effect to *any* provision of federal law that was enacted as part of the NAFTA Implementation Act. See Pet. 32 (urging that Congressional "approval" in Section 102(c) should be equated with "implementing legislation"). That construction of Section 102(c) is mistaken.

Section 102(c) does not categorically preclude private parties from relying on any and all federal statutory provisions that were enacted as part of the NAFTA Implementation Act. By its terms, the relevant text of Section 102(c) precludes suits or defenses "under the Agreement or by virtue of Congressional approval thereof." 19 U.S.C. 3312(c)(1)(A). As the court of appeals noted, Pet. 39a, "Congressional approval" of the Agreement was accomplished in Section 101(a) of the NIA, 19 U.S.C. 3311(a) ("the Congress *approves* — (1) the North American Free Trade Agreement" (emphasis added)); see 19 U.S.C. 3301(1) (defining the term "Agreement" as "the North American Free Trade Agreement *approved by the Congress under section 3311(a) of this title*" (emphasis added)). The substantive

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I.L.M. 682. See Gov't Reply in Support of Its Motions to Dismiss 5-7. In the Court of International Trade's opinion, it made clear that it was not relying on "the Agreement itself," Pet. App. 135a, but relying on Section 408 only as a statutory guide to interpreting a subsequent enactment, *id.* at 148a. Because the United States does not regard such reliance on Section 408 as inconsistent with Section 102(c), the United States did not appeal the court's holding as inconsistent with Section 102(c). Instead, the United States contested only whether the private plaintiffs had prudential standing to invoke Section 408. See Gov't C.A. Br. 46-49.

provisions of the NAFTA Implementation Act by which Congress implemented the United States' international obligations under NAFTA do not constitute Congress's "approval" of the Agreement, but rather its implementation of the Agreement. See Pet. App. 40a. As this Court recently noted, "implementing legislation passed by Congress" is how Congress gives "domestic effect" to treaties that might not otherwise have "automatic domestic effect as federal law upon ratification." *Medellin* v. *Texas*, 128 S. Ct. 1346, 1356-1357 n.2 (2008). By analogy, NAFTA is the equivalent of the treaty negotiated by the President and congressional approval in Section 101(a) of the INA the equivalent of Senate consent to ratification. Section 102(c) makes clear that neither of those actions gives rise to privately enforceable rights. Under petitioners' reading of Section 102(c), however, that provision not only precludes private individuals from relying on "the Agreement or * * * Congressional approval thereof," 19 U.S.C. 3312(c)(1)(A), but also from relying on the implementing legislation by which Congress gave domestic legal effect to the United States' international commitments under NAFTA. Nothing in the text of Section 102(c) supports that conclusion.

Nor, contrary to petitioners' contentions (Pet. 28-31), does the legislative history provide a basis for adding to the text of Section 102(c) in a way that would deprive the implementing legislation of enforceable legal effect. Rather, as the court of appeals observed, both the Statement of Administrative Action, in which the Executive explained the effect of the NIA, and the House Report that accompanied the bill confirm that Section 102(c)'s reference to "Congressional approval" means the approval effectuated by Section 101(a). See Pet. App. 41a;

H.R. Doc. No. 159, 103d Cong., 1st Sess. Vol. I, at 462 (1993) (explaining that NIA Section 102(c) precludes "private right[s] of action based on the NAFTA, or on *Congressional approval of the Agreement in section 101(a)*") (emphasis added); H.R. Rep. No. 361, 103d Cong., 1st Sess. Pt. I, at 18 (1993) (Section 102(c) contains a "general prohibition on private right[s] of action arising from the NAFTA, the supplemental agreements, or *approval of the NAFTA by Congress under section 101(a) of the bill*") (emphasis added).

c. Petitioners urge the Court to grant the petition in order to resolve an asserted conflict between the court of appeals' decision and the non-precedential decision of the United States Court of Appeals for the Ninth Circuit in *Bronco Wine Co.* v. *ATF*, 168 F.3d 498 (Table), No. 98-15444, 1999 WL 68632 (Feb. 11, 1999), cert. denied, 528 U.S. 950 (1999). Because that decision is non-precedential, and because the United States' position with respect to the scope of provisions such as Section 102(c) of the NIA has changed since the *Bronco Wine* decision, there is no need for this Court to resolve the purported conflict.

In *Bronco Wine*, the plaintiff alleged that the Bureau of Alcohol, Tobacco and Firearms' application to the plaintiff's wines of the place-of-origin regulations in 27 C.F.R. 4.39, was inconsistent with the Lanham Act, 15 U.S.C. 1052(a), as amended by the Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, 108 Stat. 4809. The district court held that judicial review of the plaintiff's cause of action was precluded by Section 102(c) of the URAA, 19 U.S.C. 3512(c)(1)(A), which is in substance identical to Section 102(c) of the NAFTA Implementation Act, 19 U.S.C. 3312(c)(1)(A). *Bronco Wine Co.* v. *United States Dept. of Treasury*, 997 F. Supp.

1318, 1321-1323 (E.D. Cal. 1997). On appeal, the Ninth Circuit affirmed in a non-precedential memorandum opinion. *Bronco Wine*, 1999 WL 68632, *1. Without further explanation, the Ninth Circuit agreed with the district court that "the Lanham Act does not provide a cause of action under which Bronco could bring a claim," *ibid.* (citing 19 U.S.C. 3512(c)(1)(A)'s language that no private party "shall have a cause of action under the [Uruguay Round] Agreement").

As the court of appeals noted in its opinion below, it is difficult to understand the precise reasoning of the Ninth Circuit in *Bronco Wine*. Pet. App. 42a-43a. It is possible, in light of the opinion's reference to 19 U.S.C. 3512(c)(1)(A)'s bar on causes of action "under the Agreement" and its omission of any reference to that section's bar on causes of action based on "Congressional approval" of the agreement, that the Ninth Circuit "conflated the URAA with the Uruguay Round Agreements" and "affirm[ed] the district court's dismissal of claims brought under the URAA on the grounds—true but irrelevant—that section 102(c) bars claims brought under the Agreements themselves." *Ibid.* Because the Ninth Circuit's decision is not precedential, a future panel of the Ninth Circuit would not be bound by that decision and would be free to align itself instead with the Federal Circuit's decision in this case. For that reason, and because the reasoning of *Bronco Wine* is unclear, there is no need for this Court to grant review in order to resolve any asserted conflict.

The possibility that the Ninth Circuit would not follow the holding in *Bronco Wine* is particularly high because the position of the United States has changed since the time *Bronco Wine* was decided. As petitioners note (Pet. 16-17 n.7), in the Government's brief in oppo-

sition to a petition for a writ of certiorari in *Bronco Wine*, the United States asserted that 19 U.S.C. 3512(c)(1)(A) barred any claim by a private party that government action was inconsistent with a provision of law enacted as part of the URAA. See *Bronco Wine*, *supra*, Br. for Resps. in Opp. 8-11 (No. 99-119). As explained above, see *supra* 13-15, the United States no longer interprets that language as establishing a categorical bar to a private party invoking a federal statutory provision that was enacted as part of the legislation that implemented the NAFTA and Uruguay Round Agreements in domestic law.

d. Review by this Court is particularly unnecessary in light of the fact that the trade dispute that gave rise to this litigation has been largely resolved. The statute about which the Government of Canada and private plaintiffs complained, the CDSOA, has been repealed, and the only remaining issues under it regard the distribution to qualifying domestic producers of duties collected on imports before October 1, 2007. Moreover, the particular product that gave rise to the largest duties on Canadian goods subject to distribution under the CDSOA, Canadian softwood lumber, were resolved by an Executive Agreement pursuant to which countervailing and antidumping duty orders on Canadian softwood lumber were rescinded, collection of countervailing and antidumping duties on such lumber ceased as of October 12, 2006, and deposits previously collected under the revoked orders were refunded to the importers. See pp. 6-7, *supra*. In light of the fact that the trade dispute has been largely resolved by Executive and Congressional action, there is no need for this Court to address the legal issues further by writ of certiorari.

2. The second issue on which petitioners seek review by this Court is whether what they call the "'magic password' provision" in Section 408 of the NAFTA Implementation Act "is an impermissible legislative entrenchment provision that restricts Congress' power of the purse." Pet. i. The court of appeals did not, however, hold that Section 408 binds later Congresses to use particular words in order to apply future amendments to the unfair trade laws to other NAFTA parties. Instead, the court of appeals merely treated Section 408 as a tool of interpretation that was not overcome by congressional "silence," as petitioners had urged. Pet. App. 45a. Although the court of appeals' own analysis of the point is not extensive, it noted its reliance upon the reasoning of the Court of International Trade. See *id.* at 44a-45a. That court acknowledged "that 'no magical password' is necessarily required" to overcome Section 408, but determined that there was, in this case, neither "any 'necessary implication,' [n]or even 'fair' implication, that Congress intended to trump Section 408 when enacting" the CDSOA. *Id.* at 147a. The court treated Section 408 as a "background canon[] of interpretation of which Congress [was] presumptively aware" when it enacted the CDSOA, *id.* at 148a (quoting *Lockhart*, 546 U.S. at 148 (Scalia, J., concurring)), not as an impermissible attempt by one Congress to bind another. The second question presented by the petition does not, therefore, warrant this Court's review.

3. Finally, we note that the petition raises a threshold question whether petitioners are proper parties to seek a writ of certiorari from this Court with respect to the judgment below. Petitioners U.S. Magnesium and United States Steel intervened, respectively, as defendants in the actions by Norsk Hydro Canada and the

Government of Canada, in light of petitioners' interest in their rights to distributions under the CDSOA of duties collected on Canadian magnesium and steel. But the complaints of Norsk Hydro Canada and the Government of Canada were dismissed for mootness and lack of standing. Pet. App. 48a-49a. Petitioners never intervened with respect to the action of the remaining plaintiff with claims that were not moot—the Canadian Wheat Board. Moreover, the court of appeals specifically held that the Canadian Wheat Board lacked standing to seek injunctive relief with respect to products other than wheat, and the court expressly directed that the injunction be modified to reflect that it only precluded distribution of duties under the CDSOA with respect to wheat. *Ibid.* Thus, the judgment of the court of appeals does not, by its own force, preclude distribution of duties to domestic producers of other products, including steel and magnesium products with respect to which petitioners have an interest.

Although Customs has indicated that, in light of the court of appeals' opinion's precedential effect, Customs will cease distribution of duties under the CDSOA with respect to other Canadian and Mexican goods as well, 71 Fed. Reg. 57,000 (2006), the judgment in this case does not itself enjoin the government to do so. If the Court were to grant the petition, it would need to address, at the threshold, whether the Court of International Trade's consolidation order made petitioners parties to the action by the Canadian Wheat Board—even though they had no dispute with the Board—and are thereby bound by the declaratory judgment that was entered in favor of that plaintiff. See Pet. App. 49a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 07-1470

In The
Supreme Court of the United States

UNITED STATES STEEL CORPORATION AND
U.S. MAGNESIUM LLC,

Petitioners,

v.

CANADIAN LUMBER TRADE ALLIANCE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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No. 07-1470

UNITED STATES STEEL CORPORATION AND U.S. MAGNESIUM LLC,

Petitioners,

v.

CANADIAN LUMBER TRADE ALLIANCE, *et al.*

Respondents.

As required by Supreme Court Rule 33.1(h), I certify that the document contains 2997 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

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U.S. Court of Appeals for the Ninth Circuit Local Rule 36-2, *Criteria for Publication* 4

I. The Government's Inconsistent Interpretations of the Statutory Bar Further Demonstrate the Confused State of the Law

As shown in the Petition for a Writ of Certiorari, Section 102(c) of the North American Free Trade Agreement ("NAFTA") Implementation Act bars private rights of action under the Administrative Procedure Act ("APA") to enforce provisions in the NAFTA implementing legislation. *See* 19 U.S.C. § 3312(c) (2000) (App. D at 194a). In finding otherwise, the holding of the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") in the instant case conflicts with the decision by the U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit") in *Bronco Wine Co. v. United States*, 168 F.3d 498 (9th Cir. 1999) ("*Bronco Wine*"). Accordingly, this Court should grant the Petition to reconcile the split between the Circuits.

In its Brief for the United States in Opposition ("Government's Brief"), the Government now takes the position that Section 102(c) does *not* bar a private right of action under the APA to enforce the NAFTA implementing legislation. Moreover, the Government argues that this Court should not grant the Petition because the Circuit split between the Federal Circuit's decision here and the Ninth Circuit's decision in *Bronco Wine* could *potentially* be resolved in the future. Specifically, the Government speculates that because *Bronco Wine* was unpublished and because the Government's position

regarding Section 102(c) has changed since that case, "a future panel" of the Ninth Circuit might "align itself with the Federal Circuit's decision in this case" and find that claims under the APA to enforce the implementing legislation are not barred. Government's Brief at 16. However, the Government's arguments in this regard are simply devoid of merit.

The Government's position regarding the statutory bar in Section 102(c) has changed dramatically since it supported the Ninth Circuit's decision in *Bronco Wine* before this very Court. *Compare* Government's Brief at 17 ("the United States no longer interprets {Section 102(c)} as establishing a categorical bar to a private party invoking a federal statutory provision that was enacted as part of the legislation that implemented the NAFTA") *with* Solicitor General, *Brief for the Respondents in Opposition*, No. 99-119 at 10-11 (Sept. 15, 1999) (App. D at 212a-213a) (supporting the Ninth Circuit's determination in *Bronco Wine* that Section 102(c) barred the plaintiff's APA cause of action to enforce the relevant implementing legislation). While the Government concedes that its position regarding Section 102(c) has changed, it offers no justification whatsoever for the change. Rather than diminish the Circuit split regarding Section 102(c), the Government's inconsistent positions and interpretations provide further evidence of the confused state of the law and the corresponding need for guidance from this Court.

In fact, the Government has reversed its position *even in the course of the instant litigation.* Specifically, the Government argued before the lower court here that Section 102(c) "imposes a direct bar upon the power of the Courts to entertain causes of action or defenses based upon NAFTA *or its implementation by Congress.*" Defendant's Supplemental Brief in Response to the Court's Questions at 24, *Canadian Lumber Trade Alliance v. United States*, Consol. Ct. No. 05-00324 (Mar. 7, 2006) (emphasis added) (Reply App. at 6a). Even the Government's brief to this Court expresses reservations regarding the Federal Circuit's interpretation of Section 102(c) and is far from clear as to the Government's current position regarding Section 102(c). Government's Brief at 11 (observing that the Federal Circuit's interpretation "could, depending on how it is applied in future cases, *give too cramped a reading to Section 102(c).*") (emphasis added); *see also id.* at 12 (noting that "{t}o be sure, there is room for debating the precise question whether {Section 408 of the NAFTA Implementation Act} should be regarded, in light of the policies reflected in Section 102(c), as the type of statutory provision that Congress intended to be invoked by private parties"). In sum, the Government's position regarding Section 102(c) has been a model of inconsistency and, therefore, supports the need for guidance from this Court.

Furthermore, the Government's attempt to minimize the Circuit split because the Ninth Circuit's decision in *Bronco Wine* was unpublished should be rejected for at least two reasons. First, in

Bronco Wine, the lower court found that the virtually identical statutory bar in Section 102(c) of the Uruguay Round Agreements Act ("URAA") "clearly and unambiguously" barred private rights of action to enforce the provisions of the URAA, which implemented the Uruguay Round Agreements. 997 F. Supp. 1318, 1322 (E.D. Cal. 1997). Based on its adoption of the lower court's finding that Section 102(c) "clearly and unambiguously" barred such actions, the Ninth Circuit had no reason to publish its opinion under that Circuit's local rules. *See* Ninth Circuit Local Rule 36-2, *Criteria for Publication* (Reply App. at 9a) (stating that an opinion will only be published if it, *inter alia*, is necessary to establish or clarify a rule of law). In other words, the fact that *Bronco Wine* was unpublished does not mean that it is more likely to be overturned by the Ninth Circuit. To the contrary, the proper interpretation of Section 102(c) is crystal clear in the Ninth Circuit and, therefore, is unlikely to be reversed. Second, to the extent that the Government contends that certiorari may not be granted to resolve a split among the circuits caused by an unpublished decision, that is simply not the case. This Court has frequently granted certiorari to resolve a split among the circuits under these very circumstances. *See, e.g., E. Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 61 (2000) (split based on an unpublished decision); *Lynce v. Mathis*, 519 U.S. 433, 436 (1997) (same); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 452-54 (1993) (same); *Burlington Northern R. Co. v. Oklahoma Tax Com'n*, 481 U.S. 454, 460 (1987) (same). The Court should do the same here.

Even assuming, *arguendo*, that the Ninth Circuit would choose to re-examine *Bronco Wine* and align itself with the Federal Circuit, the question remains as to which particular interpretation of Section 102(c) that has been proffered by the Federal Circuit would be followed. The Government speculates that the Ninth Circuit would select the Federal Circuit's decision in the instant case. However, the Ninth Circuit could just as easily choose to follow the Federal Circuit's conflicting decision in *Timken Co. v. United States*, in which the Federal Circuit recognized that Section 102(c) of the URAA "bars parties from bringing claims directly against the government on the ground that Commerce acted inconsistently with the {URAA}." 354 F.3d 1334, 1341 (Fed. Cir. 2004). Thus, even within the Federal Circuit, there is confusion as to the proper interpretation of Section 102(c).

Clearly, there is a Circuit split between the Federal Circuit and the Ninth Circuit as to the meaning and effect of Section 102(c). The Government's inconsistent interpretations of Section 102(c) do not minimize the Circuit split, but rather provide further evidence of the confused state of the law and the need for guidance from this Court. Accordingly, the Petition for a Writ of Certiorari should be granted.

II. The Government's Characterization of Section 408 of the NAFTA Implementation Act as a Canon of Interpretation Is Flatly Wrong

For the reasons set forth in the Petition for a Writ of Certiorari, Section 408 of the NAFTA Implementation Act constitutes an impermissible legislative entrenchment provision that restricts Congress' crucial power of the purse. *See* 19 U.S.C. § 3438 (2000) (App. D at 195a). Specifically, Section 408 is a so-called "magic password" statute in that it forces Congress to utter the words "apply to goods from Canada" and "apply to goods from Mexico" in order for amendments to Title VII of the Tariff Act of 1930, as amended ("Title VII of the Tariff Act"), to apply to such goods. *See id.* While this Court has not directly addressed the validity of magic password statutes, at least one Justice – *i.e.*, Justice Scalia – has expressed the view that they represent impermissible legislative entrenchment provisions. *Lockhart v. United States*, 546 U.S. 142, 147-50 (2005) ("*Lockhart*"); *see also* Larry Alexander, Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 Const. Comment. 97, 105 (2003) (App. D at 204a-205a) ("Congress may not force a future Congress to use particular language to legislate.").

The Government now argues that Section 408 is not an impermissible legislative entrenchment provision but rather a "tool" or canon of interpretation. Government's Brief at 18. According

to the Government, because Section 408 is a canon of interpretation, rather than a magic password provision, the Federal Circuit's decision does not conflict with Justice Scalia's concurrence in *Lockhart*. As shown below, the Government's argument vastly misconstrues both *Lockhart* and Section 408 and, once again, is inconsistent with the Government's prior position in this case.

In his concurring opinion in *Lockhart*, Justice Scalia clearly expressed the view that magic password provisions constitute impermissible legislative entrenchment provisions. However, Justice Scalia recognized that such provisions may not be declared invalid where they "*add little or nothing* to {the Court's} already-powerful presumption against implied repeals." 546 U.S. at 148-49 (Scalia, J. concurring) (emphasis added). Specifically, when a magic password provision states that a statute cannot be repealed absent an express statement, it merely reiterates the pre-existing canon of interpretation against implicit repeals. Such a magic password provision does not place any substantive requirements on a future Congress that are not already imposed by the Court's canon against implicit repeals. In other words, such a provision may be treated as a canon of interpretation consistent with the canon against implicit repeals and, therefore, be upheld on that basis. *See generally id.* at 149-50 ("{i}n the present case, it might seem more respectful of Congress to refrain from declaring the invalidity of the express-reference provision.")

In contrast, Section 408 of the NAFTA Implementation Act places a unique substantive requirement on a future Congress that does not already exist. Section 408 requires Congress to utter certain magic words for amendments to Title VII of the Tariff Act to apply to goods from Canada and Mexico. There are no issues regarding repeals of other statutes, either implicitly or otherwise. Thus, Section 408 does not simply reiterate or operate concurrently with the canon of interpretation against implicit repeals or any other canon of interpretation. It is an invalid magic password provision that cannot be reconciled with Justice Scalia's concurrence in *Lockhart* and this Court's long history of decisions against legislative entrenchment provisions.

As was the case with Section 102(c), the Government's views on Section 408 have changed drastically during the course of the instant litigation. This change in position clearly undermines the Government's current position that Section 408 is simply a canon of interpretation. For example, in the following exchange between the Court of International Trade ("CIT") and counsel for the Government, the Government rejected the argument that Section 408 was a canon of interpretation and not an impermissible magic password provision:

> **Gov't**: In this case, Congress subsequently passed the Byrd Amendment {(*i.e.*, the Continued Dumping and Subsidy Offset Act of 2000 (the "CDSOA"))}. To argue that it is precluded from doing so by a prior

enactment of the NAFTA Implementation Act violates the Supreme Court precedent. ...

CIT: It can certainly subject its self {sic} to clear magic words requirements.

Gov't: *No, it cannot subject itself to magic word requirements.*

CIT: It can't.

Gov't: No and I'll cite Northern Railroad Company v United States 208 U.S. 45 for that provision.

CIT: So repeal by implication, that's fine?

Gov't: Repeal by implication, I believe so, your Honor, but *Congress cannot restrict a future Congress from taking a specific action. It cannot require the magic –*

CIT: It can say that future laws will be interpreted in light of provisions of past instance.

Gov't: *No I believe in Lockhart v. United States the concurrence of Justice Scalia makes it very clear, I realize it's a concurrence, he's relying on Supreme Court precedence, ... makes it very clear that Congress cannot restrict a future Congress.*

CIT Hearing Transcript at 559-563 (Mar. 30, 2006) (emphasis added) (Reply App. 1a-4a); *see also* Defendant's Post-Hearing Supplemental Brief at 5, *Canadian Lumber Trade Alliance v. United States*, Consol. Ct. No. 05-00324 (Apr. 4, 2006) ("notwithstanding Congress's statement that it would specify when future legislation regarding goods from {NAFTA} countries should apply to those countries, Congress was not legally required to adhere to that intent") (Reply App. 8a). Accordingly, the Government's own statements and arguments in this very case clearly show that it did not interpret Section 408 as a canon of interpretation, but rather as a substantive requirement on Congress to which it was not legally required to adhere.

The bottom line is that Section 408 of the NAFTA Implementation Act is a substantive requirement imposed on future Congresses, rather than a canon of interpretation. As such, it constitutes a magic password provision.

Because this Court has not directly addressed the validity of magic password provisions, there has been a great deal of uncertainty among the Courts of Appeal on this issue. *See United States v. Novak*, 476 F.3d 1041, 1054 n.12 (9th Cir. 2007) (holding that "it is an open question whether Congress could validly impose such a clear statement rule"); *Robinette v. Commissioner of I.R.S.*, 439 F.3d 455, 460 (8th Cir. 2006) (asking, in light of *Lockhart*, "{w}hether or not the Congress of 1946 may bind the Congress of 1998 to make an 'express statement.'"). The fact that Section 408 is a magic password

provision that does not implicate the canon against implicit repeals, coupled with the infringement of Congress' crucial power of the purse caused by Section 408, make this case the ideal vehicle by which the Court can resolve this uncertainty. The Court should therefore grant the Petition for a Writ of Certiorari on this ground as well.

III. The Government's Attempts to Minimize the Impact of the Federal Circuit's Decision Lack Merit

Notwithstanding the split among the Circuits regarding Section 102(c) and the continued confusion surrounding the validity of magic password provisions, the Government argues that the Petition for a Writ of Certiorari should be denied because the Federal Circuit's "holding on the merits concerns the construction of a statute {(*i.e.*, the CDSOA)} that has been repealed, and the underlying dispute arose in the context of an international trade dispute {(*i.e.*, softwood lumber imports from Canada)} that has been resolved in significant part by Executive Agreement." Government's Brief at 10. However, as demonstrated below, the Government completely underestimates the impact of the Federal Circuit's decision in this case.

While the CDSOA has been repealed, duties collected on merchandise that entered the United States before October 1, 2007 can and will still be distributed under the program for many years to come. Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601(b), 120 Stat. 4, 154 (2006) (App. D at

201a). Consequently, Customs currently holds tens of millions of dollars in duties that will be directly impacted by the resolution of the instant case.[1] Additionally, resolution of the softwood lumber dispute with Canada had no impact on the 37 other antidumping and countervailing duty orders on NAFTA-origin goods for which CDSOA distributions are blocked due to the declaratory judgment entered by the lower court here. *See Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 73 Fed. Reg. 31196, 31204-31255 (May 30, 2008) (notice) (listing orders on Canadian and Mexican imports).[2]

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[1] In fact, two cases concerning CDSOA distributions are stayed pending resolution of this case. *Ivaco Rolling Mills 2004, L.P. et al v. United States*, Court No. 06-297 (Ct. Int'l Trade Nov. 21, 2006) (order granting motion to stay); *ThyssenKrupp Mexinox S.A. de C.V. et al v. United States*, Court No. 06-236 (Ct. Int'l Trade Sept. 25, 2006) (order granting motion to stay).

[2] On a related note, the Government contends that Petitioners are not proper parties to seek certiorari because the injunctive relief ultimately entered by the lower court only covers CDSOA disbursements to which Petitioners are not eligible – *i.e.*, disbursements stemming from imports of wheat. Government's Brief at 18-19. However, "any party" to the action below can bring a petition for a writ of certiorari. 28 U.S.C. § 1254(1) (2000). It is undisputed that Petitioners were parties to the consolidated action below. Moreover, the lower court entered declaratory relief explicitly covering all duties assessed on Canadian and Mexican goods, which the Government has interpreted as preventing CDSOA disbursements to Petitioners. Accordingly, the Government's argument that Petitioners are not proper parties here is simply baseless.

But perhaps even more importantly, the interpretation of Section 102(c) has far-reaching consequences beyond its application to CDSOA disbursements. Specifically, the relevant language subject to conflicting interpretations between the Federal Circuit and Ninth Circuit – *i.e.*, the language barring actions arising "by virtue of Congressional approval" of the relevant agreement – has been included as a statutory bar to causes of action in *every single* trade bill that has been adopted by Congress pursuant to the fast track mechanism.

Likewise, the validity of magic password provisions has far reaching consequences. In fact, according to the lower court, if Justice Scalia's concurrence in *Lockhart* is correct, it would impact not just the CDSOA but, *inter alia*, the Defense of Marriage Act (1 U.S.C. § 7 (2000)), the Religious Freedom Restoration Act of 1993 (42 U.S.C. § 2000bb-3(b) (2000)), and the National Emergencies Act (50 U.S.C. § 1621 (2000)). *Canadian Lumber Trade Alliance v. United States*, 425 F. Supp. 2d 1321 (Ct. Int'l Trade 2006) (App. B at 50a).

Therefore, neither the repeal of the CDSOA nor the resolution of the softwood lumber dispute diminish the importance of the Circuit split over Section 102(c) or the confusion over magic password provisions. In order to resolve these two crucial issues, this Court should grant the Petition for a Writ of Certiorari.

CONCLUSION

For all of the above-stated reasons, the Government's arguments in opposition should be rejected and the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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August 12, 2008

APPENDIX

Court of International Trade Hearing Transcript

Canada Lumber Trade Alliance v. United States,
Consol. Court No. 05-00324

March 30, 2006

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THE COURT: Before you do that, do you want to say anything about Mr. Bernstein's argument, that in fact their right is a statutory right that has been incorporated into NAFTA?

MR. SILVERBRAND: Yes, your Honor. It's not a statutory right that's granted to them. First of all, the statute varies from the actual article of NAFTA. Moreover – just bear with me, your Honor, one second – this [Page 559] somewhat relates to the merit issues, in that Congress, and I'm citing to Marcello v. Bonds which was cited by, the concurrence by Justice Scalia and Lockhart for the United States.

"No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly as language from the APA."

The answer of the Court was, the Court refused to require the Congress to employ magical words in order to effectuate an exemption from the Administrative Procedure Act. "We have made clear in other cases as well that an express reference or an express statement provision cannot nullify the unambiguous import of a subsequent statute."

In this case, Congress subsequently passed the Byrd Amendment. To argue that it is precluded from doing so by a prior enactment of the NAFTA Implementation Act violates the Supreme Court precedent.

As far as producer plaintiffs' standing issue goes, on their opening, [Page 560] producer plaintiffs asserted that Dr. Teece did not base his findings, his oversupply findings on any data. Well, he specifically cited in his report – it's page 4 of attachment C, the Foreign Agricultural Service USDA official estimates, that's what he relied on, which is government statistics for his assertion that there's an oversupply in the market. So to allege that there's no oversupply or that he didn't base it upon facts is simply incorrect.

Whether it actually came into evidence pursuant to Rule 703 or not does not bear upon the issue that Dr. Teece's testimony was based upon the examination of facts in the industry. He specifically found that there was oversupply in the industry.

None of the plaintiffs can demonstrate prudential standing in this matter. For a plaintiff to have prudential standing under the APA, the interest sought to be protected by the complainant must be arguably within the zone of interest to be protected or regulated by the statute in [Page 561] question. Here there's no indication that Congress intended to provide either Canada or the private plaintiffs prudential standing under the Byrd Amendment or under the APA. Neither indicate that they should have standing to challenge the Byrd

Amendment, and they have not demonstrated that they do have the prudential standing here.

Specifically, the zone of interest protected by Section 3438 can only be the interests of the United States in the administration of its own antidumping and countervailing duty laws in a manner that's consistent with its international obligations.

THE COURT: Why is that? It couldn't protect the interests of the Canadian producers?

MR. SILVERBRAND: There's nothing in that statutory language to indicate that it should be or was enacted to protect foreign producers, your Honor.

THE COURT: On its face, it limits the exercise of Congressional authority.

MR. SILVERBRAND: But as I stated [Page 562] earlier, Congress cannot limit its own authority to–

THE COURT: It can certainly subject its self to clear magic words requirements.

MR. SILVERBRAND: No, it cannot subject itself to magic word requirements.

THE COURT: It can't.

MR. SILVERBRAND: No and I'll cite Northern Railroad Company v. United States 208 U.S. 452 for that provision.

THE COURT: So repeal by implication, that's fine?

MR. SILVERBRAND: Repeal by implication, I believe so, your Honor, but Congress cannot restrict a future Congress from taking a specific action. It cannot require the magic–

THE COURT: It can say that future laws will be interpreted in light of provisions of past instance.

MR. SILVERBRAND: No I believe in Lockhart v. United States the concurrence of Justice Scalia makes it very clear, I realize it's a concurrence, he's relying on Supreme [Page 563] Court precedence, this is 2005 Westlaw 32993980, makes it very clear that Congress cannot restrict a future Congress. ...

UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: THE HONORABLE
DONALD C. POGUE, JUDGE

CANADIAN LUMBER TRADE ALLIANCE, et al., Plaintiffs, v. UNITED STATES, Defendant, and COALITION FOR FAIR LUMBER IMPORTS EXECUTIVE COMMITTEE, et al., Defendants-Intervenors.	Consol. Court No. 05-00324

DEFENDANT'S SUPPLEMENTAL BRIEF

[March 7, 2006]

[Page 24]

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Section 3312, by contrast states, in relevant part, "No person other than the United States– (1) shall have any cause of action or defense under– (A) the Agreement or by virtue of Congressional approval thereof, or (B) the North American

Agreement on Environmental Cooperation or the North American Agreement on Labor Cooperation...." Section 3312 is jurisdictional, because it imposes a direct bar upon the power of the Courts to entertain causes of action or defenses based upon NAFTA or its implementation by Congress. Neither the APA nor section 410(a) contain any similar language that would prevent a court from exercising jurisdiction to entertain certain claims.

UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: THE HONORABLE

DONALD C. POGUE, JUDGE

CANADIAN LUMBER TRADE ALLIANCE, et al., Plaintiffs, v. UNITED STATES, Defendant.	)	Consol. Court No. 05-00324

DEFENDANT'S POST-HEARING SUPPLEMENTAL BRIEF

[April 4, 2006]

[Page 5]

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III. Congress Cannot Bind A Future Congress By Employing Statutory Language Purporting To Do So, And A Statement Of Congressional Intent Is Not Enforceable

"[O]ne legislature, cannot abridge the powers of a succeeding legislature." Fletcher v. Peck, 6 Cranch 87, 135, 3 L.Ed. 162 (1810). "The correctness of this principle, so far as respects general legislation can never be controverted." Id.; see also Marbury v. Madison, 1 Cranch 137, 177, 2 L.Ed. 60 (1803).

Supreme Court opinions have uniformly endorsed this principle. See e.g., United States v. Winstar Corp., 518 U.S. 839, 872 (1996) (plurality opinion); Reichelderfer v. Quinn, 287 U.S. 315, 318 (1932) ("[T]he will of a particular Congress... does not impose itself upon those to follow in succeeding years"). The Supreme Court has refused "to require the Congress to employ magical passwords in order to effectuate an exemption from the Administrative Procedure Act." Marcello v. Bonds, 349 U.S. 302, 310 (1955). An express-reference or express-statement provision cannot nullify the unambiguous import of a subsequent statue. Great Northern R. Co. v. United States, 208 U.S. 452, 465 (1908).

Thus, notwithstanding Congress's statement that it would specify when future legislation regarding goods from North American Free Trade Agreement countries should apply to those countries, Congress was not legally required to adhere to that intent. In any event, as we have demonstrated, the Continued Dumping and Subsidy Offset Act does not apply to "goods."

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CIRCUIT RULE 36-2
CRITERIA FOR PUBLICATION

A written, reasoned disposition shall be designated as an OPINION only if it:

(a) Establishes, alters, modifies or clarifies a rule of law, or

(b) Calls attention to a rule of law which appears to have been generally overlooked, or

(c) Criticizes existing law, or

(d) Involves a legal or factual issue of unique interest or substantial public importance, or

(e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or

(f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or

(g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression.